REPORTS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief.

Case No. EM-2007-0374
Decided January 2, 2008

Electric §1. The Commission denies the Office of the Public Counsel's motion to dismiss as being wholly without merit.

Electric §7. The Office of the Public Counsel voluntarily submitted to the Commission's jurisdiction by exercising its discretionary authority to participate in this action. Section 386.710.1; Commission Rule 4 CSR 240-2.010(11).

Evidence, Practice and Procedure §24. An improper *ex parte* contact is a one-sided contact from an adversarial party with a decisionmaker, after an evidentiary hearing has been set during a contested case proceeding, attempting to sway the judgment of the decisionmaker(s), or bring pressure or influence to bear upon the decisionmaker(s), outside of the hearing process.

The Missouri Supreme Court Judicial Canons provide an exception to the *ex parte* rule for *ex parte* contacts that are authorized by statute. Judicial Canon 3(B)(7)(e).

Section 386.210, RSMo Cum. Supp. 2008, authorizes Commissioners to have contacts with public utility executives regarding any issue that, at the time of the communication, is not the subject of a case filed with the Commission.

Evidence, Practice and Procedure §26. In order for any proper party to succeed on a motion to disqualify a Commissioner on the basis of some form of alleged bias or impropriety it must provide a sufficient factual basis to overcome the presumption that the administrative decisionmaker acts honestly and impartially.

To establish actual bias on the part of a Commissioner, the party must prove that the Commissioner has formulated an unalterable prejudgment of the operative adjudicative facts of the case.

To establish the existence of actual impropriety on the part of a Commissioner, the party must prove that the Commissioner is interested, (i.e. has a stake in the case) or prejudiced or occupies the status of a party to the matter.

To establish an appearance of impropriety, the party must prove that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioner would doubt the impartiality of that Commissioner.

The evidentiary standard for proving actual bias, actual impropriety and the appearance of impropriety is the clear and convincing evidence standard.

Evidence, Practice and Procedure §25. The Office of the Public Counsel's motion to dismiss, based upon allegations of improper *ex parte* contacts, fails to establish that any *ex parte* contacts occurred. The Office of the Public Counsel's motion to dismiss ignores the legislature's statutory authorization for the contacts that occurred between the corporate executives and the Commissioners prior to this action being filed with the Commission. Even if the Judicial Canons apply to the Commissioners, which the Office of the Public Counsel's motion to dismiss fails to establish, Public Counsel ignores the express exception in the Judicial Canons that permits the contacts at issue.

The Office of the Public Counsel's motion to dismiss: (1) fails to provide a sufficient factual basis to overcome the presumption that the Commissioners, as administrative decisionmakers, are acting honestly and impartially; (2) fails to establish bias by proving that the Commissioners have formulated an unalterable prejudgment of the operative adjudicative facts of the case; (3) fails to establish actual impropriety on the part of any Commissioner by proving that the Commissioner is interested, (i.e. has a stake in the case) or prejudiced or occupies the status of a party to the matter; and (4) fails to establish an appearance of impropriety by proving that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioners would doubt the impartiality of the Commission.

Lacking any merit to its claims, it appears OPC is attempting to gain an improper tactical advantage by the inappropriate use of the Standard of Conduct Rules.

ORDER DENYING MOTION TO DISMISS

Syllabus: On December 13, 2007,[1] the Office of the Public Counsel ("OPC") filed a pleading styled "Motion to Dismiss." The gravamen of OPC's motion concerns allegations of bias and prejudgment on the part of three Commissioners presiding over this matter. OPC's allegations are of a very serious nature, and the Commission approaches these allegations with the utmost commitment to thoroughly review and consider these allegations. Bearing this commitment in mind, the

[1] All dates throughout this order refer to the year 2007 unless otherwise noted.

Commission must conclude that OPC's analysis of the legal issues identified in its motion is at best incomplete and at worst misleading. OPC fails to accurately cite to the proper controlling law or to any factual evidence to provide a basis for granting its motion. Instead, OPC relies on conclusory statements, fractionated legal precepts and innuendo to assert that no necessary quorum of this Commission could objectively preside over and render an impartial decision in this matter. The motion shall be denied as being meritless.

The Commission's Quasi-Judicial Authority and Procedural Due Process

The PSC is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto.[2] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity.[3] Thus, administrative decision-makers must be impartial.[4] Officials occupying quasi-judicial positions are held to the same high standard as apply to judicial officers in that they must be free of any interest in the matter to be considered by them.[5] A presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption.[6] A judge or administrative decision-maker is without jurisdiction, and a writ of prohibition would lie, if the judge or decision-maker failed to disqualify himself on proper application.[7]

The Commission's quasi-judicial power is exercised in "contested cases," meaning proceedings before the agency in which legal rights, duties or privileges of specific parties are required by law to be

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[2] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Union Elec. Co. v. Pub. Serv. Comm'n,* 591 S.W.2d 134, 137 (Mo. App. 1979).

[3] *Thompson*, 100 S.W.3d at 919 -920; *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. 1990) (citing *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)).

[4] *Id.*

[5] *Thompson*, 100 S.W.3d at 919-920; *Union Elec. Co.,* 591 S.W.2d at 137.

[6] *Thompson*, 100 S.W.3d at 919-920; *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).

[7] *Thompson*, 100 S.W.3d at 919-920; *State ex rel. Ladlee v. Aiken,* 46 S.W.3d 676, 678 (Mo. App. 2001); *State ex rel. White v. Shinn,* 903 S.W.2d 194, 196 (Mo. App.1995).

determined after hearing.[8] It is only when the Commission exercises its quasi-judicial power that full procedural due process protections come into play.[9] "Due process requires an impartial decision maker, but it also presumes the honesty and impartiality of decision makers in the absence of a contrary showing."[10]

"Administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise."[11] "Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker,"[12] "in the absence of a showing that [the decisionmaker] is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[13] An administrative hearing is not unfair unless the decision makers, prior to the hearing, have determined to reach a particular result regardless of the evidence.[14] "Conversely, any administrative decisionmaker who has made an **unalterable prejudgment of operative adjudicative facts is considered biased**." (Emphasis added.)[15] "Because of the risk that a biased decisionmaker may influence other, impartial adjudicators, the

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[8] Section 536.010(4), RSMo 2000. An agency decision which acts on a specific set of accrued facts and concludes only them is an adjudication. *Ackerman v. City of Creve Coeur*, 553 S.W.2d 490, 492 (Mo. App. 1977). *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. 1979).

[9] "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). The PSC is not obligated to provide evidentiary procedures at rulemaking hearings other than providing the opportunity to "present evidence." Cross-examination of witnesses and the presentation of rebuttal evidence are procedures employed in contested cases but not rulemaking hearings. *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759 - 760 (Mo. banc 2003).

[10] *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 413 (Mo. banc 2007). See also *Mueller v. Ruddy,* 617 S.W.2d 466, 475 (Mo. Ct. App. 1981); *Fitzgerald,* 796 S.W.2d at 59.

[11] *Fitzgerald*, 796 S.W.2d at 59; *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assoc.,* 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976).

[12] *Fitzgerald*, 796 S.W.2d at 59; *Wilson v. Lincoln Redevelopment Corp.,* 488 F.2d 339, 342-43 (8th Cir. 1973).

[13] *Fitzgerald*, 796 S.W.2d at 59 (Mo. App. 1990); *Hortonvillet,* 96 S.Ct. at 2314.

[14] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).

[15] *Fitzgerald*, 796 S.W.2d at 59.

participation of such a decisionmaker in an administrative hearing generally violates due process, even if his [or her] vote is not essential to the administrative decision."[16]

OPC's Allegations

OPC alleges that Commissioners Murray, Appling, and Clayton participated in non-public meetings with Michael J. Chesser, Chief Executive Officer of Great Plains Energy, Inc. ("GPE") and Chairman of the Board of both GPE and Kansas City Power & Light Company ("KCPL"), and with William H. Downey, Chief Operating Officer and Member of the Board of Directors for GPE, the holding company of KCPL, and the President and Chief Executive Officer of KCPL. OPC further asserts that the communications in these meetings, that occurred prior to the instant action being filed before the Commission, tainted the process in this proceeding so irreparably that none of these Commissioners should be able to preside over this matter or render a decision with regard to the proposed merger. OPC intimates that the meetings between the executives of the companies and the Commissioners were more than informational in nature and that they were designed to generate support for a favorable decision to support the merger. Finally, OPC claims that with Chairman Davis already being recused from this proceeding,[17] and with only one other commissioner remaining, Commissioner Jarrett, that the Commission is prevented, as a body, to even act upon this matter.[18]

Relevant Statutes, Commission Rules, Judicial Canons and Case Law

Section 386.210

The legislature has provided a bright-line law governing external communications with the Commissioners singularly or when sitting en banc. Section 386.210, RSMo Cum. Supp. 2006, provides, in pertinent part:

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[16] *Fitzgerald*, 796 S.W.2d at 59; *State ex rel. Brown v. City of O'Fallon,* 728 S.W.2d 595, 598 (Mo. App. 1987).

[17] Chairman Davis, *sua sponte*, recused himself from this matter on December 6, 2007.

[18] Commissioner Terry Jarrett was appointed to the Commission for a six-year term on September 11, 2007. Consequently, he was not a member of the Commission during the time period when the communications that are the subject of OPC's motion occurred. As OPC noted in its motion, Commissioner Jarrett is "not implicated in any way in the matter raised" in its motion.

1. The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties.
2. Such communications may address any issue that at the time of such communication is not the subject of a case that has been filed with the commission.
3. Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication:
(1) Is made at a public agenda meeting of the commission where such matter has been posted in advance as an item for discussion or decision;
(2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present; or
(3) If made outside such agenda meeting or forum, is subsequently disclosed to the public utility, the office of the public counsel, and any other party to the case in accordance with the following procedure:
(a) If the communication is written, the person or party making the communication shall no later than the next business day following the communication file a copy of the written communication in the official case file of the pending filing or case and serve it upon all parties of record;
(b) If the communication is oral, the party making the oral communication shall no later than the next business day following the communication file a memorandum in the official case file of the pending case disclosing the communication and serve such memorandum on all parties of record. The memorandum must contain a summary of the substance of the communication and not merely a listing of the subjects covered.

> 4. Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.
> 5. The commission and any commissioner may also advise any member of the general assembly or other governmental official of the issues or factual allegations that are the subject of a pending case, provided that the commission or commissioner does not express an opinion as to the merits of such issues or allegations, and may discuss in a public agenda meeting with parties to a case in which an evidentiary hearing has been scheduled, any procedural matter in such case or any matter relating to a unanimous stipulation or agreement resolving all of the issues in such case.

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Commission Rule 4 CSR 240-4.020

Commission Rule 4 CSR 240-4.020, entitled “Conduct During Proceedings,” provides:

> (1) Any attorney who participates in any proceeding before the commission shall comply with the rules of the commission and shall adhere to the standards of ethical conduct required of attorneys before the courts of Missouri by the provisions of Civil Rule 4, Code of Professional Responsibility, particularly in the following respects:
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> (A) During the pendency of an administrative proceeding before the commission, an attorney or law firm associated with the attorney shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public

communication if it is made outside the official course of the proceeding and relates to any of the following:

1. Evidence regarding the occurrence of transaction involved;

2. The character, credibility or criminal record of a party, witness or prospective witness;

3. Physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to examinations or tests;

4. His/her opinion as to the merits of the claims, defenses or positions of any interested person; and

5. Any other matter which is reasonably likely to interfere with a fair hearing.

(B) An attorney shall exercise reasonable care to prevent employees and associates from making an extra-record statement as s/he is prohibited from making; and

(C) These restrictions do not preclude an attorney from replying to charges of misconduct publicly made against him/her, or from participating in the proceedings of legislative, administrative or other investigative bodies.

(2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, as to the merits of the cause with any commissioner or examiner before whom proceedings are pending except:

(A) In the course of official proceedings in the cause; and

(B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.

(3) No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

(4) It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer assigned to the proceeding. (5) Requests for expeditious treatment of matters pending with the commission are improper except when filed with the secretary and copies served upon all other parties.

(6) No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent.

(7) These prohibitions apply from the time an on-the-record proceeding is set for hearing by the commission until the proceeding is terminated by final order of the commission. An on-the-record proceeding means a proceeding where a hearing is set and to be decided solely upon the record made in a commission hearing.

> (8) As *ex parte* communications (either oral or written) may occur inadvertently, any member of the commission, hearing examiner or employee of the commission who receives that communication shall immediately prepare a written report concerning the communication and submit it to the chairman and each member of the commission. The report shall identify the employee and the person(s) who participated in the *ex parte* communication, the circumstances which resulted in the communication, the substance of the communication, and the relationship of the communication to a particular matter at issue before the commission.

The operative words of the Commission's rule is "conduct during proceedings." Subsection 7 of the rule makes clear that the prohibitions outlined in the rule apply only after a hearing is set to be decided upon the record made in that commission hearing.

The Judicial Canons

It is arguable as to whether the Judicial Canons apply to the Commissioners of administrative agencies.[19] Without addressing that issue directly, the Commission still finds that several provisions of the Code of Judicial Conduct are illuminating. Canon 3(B)(5) provides that a judge, in the performance of judicial duties, shall not by words or conduct manifest bias or prejudice. More on point with the issues surrounding the external communications between corporate officers and the Commissioners that are raised by OPC in its motion is Canon 3(B)(7), which provides:

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate,

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[19] The arguments on this put forth by the Commission's Staff and by GPE, KCPL and Aquila regarding whether the judicial canons apply are persuasive, but as the remainder of this order demonstrates, even if the Commission assumes, *arguendo*, that the canons do apply, this does little to rescue OPC's position. The standard for recusal is defined by case law, and that standard applies regardless of the wording of the judicial canons, and it is that standard that controls. The arguments herein referenced may be found in ***Staff's Response to Public Counsel's Motion to Dismiss***, filed December 27, 2007 and ***Applicants' Opposition to Motion to Dismiss***, filed on December 26, 2007.

> permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
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> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
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> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
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> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
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> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
>
> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
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> **(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.** (Emphasis added.)

Canon 3E(1) provides a judge shall recuse in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 2(A) provides that a judge shall act at all times in a manner that

promotes public confidence in the integrity and impartiality of the judiciary. The Commentary to Canon 2 provides: The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

Legal Standard for Recusal

In *Smulls v. State*,[20] the Missouri Supreme Court articulated the proper legal standard for recusal of a judge for an alleged violation of due process for having prejudged a matter or for being biased. The Court succinctly stated:

> Canon 3(D)(1) of the Missouri Code of Judicial Conduct, Rule 2.03, requires a judge to recuse in a proceeding where a "reasonable person would have a factual basis to doubt the judge's impartiality." *Id.* This standard does not require proof of actual bias, but is an objective standard that recognizes "justice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1986). Under this standard, a "reasonable person" is one who gives due regard to the presumption "that judges act with honesty and integrity and will not undertake to preside in a trial in which they cannot be impartial." *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996). In addition, a "reasonable person" is one "who knows all that has been said and done in the presence of the judge." *Haynes v. State,* 937 S.W.2d 199, 203 (Mo. banc 1996). Finally, as to due process challenges, the Supreme Court has made clear that "only in the most extreme of cases would disqualification on this basis be constitutionally required." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *see also State v. Jones,* 979 S.W.2d 171, 177 (Mo. banc 1998).[21]

[20] *Smulls v. State*, 71 S.W.3d 138, 145 (Mo. banc 2002).
[21] *Id.*

"To qualify, the bias must come from an extrajudicial source that results in the judge forming an opinion on the merits based on something other than what the judge has learned from participation in the case."[22]

The Supreme Court has discussed, at length, the meaning of this standard in many cases and with regard to the presumption of a judge's impartiality the court has clarified: "that presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court."[23] Keeping in mind, of course, that a "reasonable person is one "who knows all that has been said and done in the presence of the judge."[24] The court has further stated: "The judge himself or herself is in the best position to decide whether recusal is necessary."[25] Moreover, "[a] judge has an affirmative duty not to disqualify himself unnecessarily."[26]

Testimony at Hearing, Hearing Exhibits and Deposition Testimony

OPC's Alleged Factual Basis For Its Motion to Dismiss

OPC alleges that on or about January 24, 2007, a series of four or five meetings were held between Commissioners Murray, Appling and Clayton (in groups of one or two commissioners) and Mr. Chesser and Mr. Downey, and that no notice was given to the public or to the OPC about these meetings. OPC, citing to various hearing exhibits, portions of transcripts and deposition passages, claims these discussions with Commissioners were critical to Great Plains moving forward with its plans to finalize a merger with Aquila. Quoting directly from OPC's Motion to Dismiss, OPC notes the following:

> "In a July 19, 2006, memo to the Great Plains board of directors, Terry Bassham, Chief Financial Officer of both Great Plains and KCPL, stated: "The regulators [*sic*] response to this plan and its concepts will be critical to our final evaluation of the transaction. Although it is not timely to speak to the regulators at this point,

[22] *State v. Jones*, 979 S.W.2d 171, 178 (Mo. banc 1998).
[23] *State v. Kinder,* 942 S.W.2d 313, 321 (Mo. banc 1996).
[24] *Smulls*, 71 S.W.3d at145.
[25] *Jones*, 979 S.W.2d at 178.
[26] *State ex rel. Bates v. Rea*, 922 S.W.2d 430, 431 (Mo. App. 1996).

discussions with them in Phase II will clearly impact our ability to make a final offer." Exhibit 26, page 3. Before it would make a final bid for Aquila, before it would set its final price, before it would publicly announce the deal, Great Plains had to know that no Commissioner had any objection to the three "support mechanisms" (Chesser Deposition, page 39.) that Great Plains would later submit for Commission approval. Great Plains believed that these discussions were so absolutely critical that they were required in Great Plains' Final Bid:

"In order to deliver a transaction which will create the immediate and sustainable long term value for Aquila and Great Plains' shareholders, we require informal discussions with regulators prior to the execution of a definitive merger agreement for this transaction. Our bid is subject to holding these discussions concurrent with the negotiation of the definitive Merger Agreement." Exhibit 121, page 2.

Great Plains needed these discussions with Commissioners to "yield comfort" (Exhibit 26, page 3) around its ability to get approval consistent with its proposed regulatory treatment. The three support mechanisms or ratemaking treatments discussed with the Commissioners are: 1) a 50/50 split of synergies in the first five years; 2) regulatory amortizations for Aquila; and 3) recovery of the actual cost of Aquila's high cost of debt. (Chesser Deposition, pages 39-40.) Mr. Chesser and Mr. Downey did not just explain the mechanics of the transaction (the Black Hills piece of the deal, the Gregory acquisition subsidiary, etc.) to the Commissioners, they explained in detail what the joint applicants needed the Commission to approve once the issues were before the Commission for a decision.

Great Plains needed to not only give the Commissioners this detailed information, but to get something in return. Great Plains wanted to have "conversations" (Exhibit

105, page 11) or "discussions" (Exhibit 101, page 3) with regulators; Mr. Chesser and Mr. Downey were going to lay out "the dimensions of the deal" and "listen for reactions." (Chesser Deposition, pages 63, 125). They wanted to get "indications" (Exhibit 302, page 1) that the Commissioners would approve synergy sharing and regulatory amortizations. Mr. Chesser "felt good" about the reaction of the Commissioners; he understood that Aquila CEO Richard Green did as well. (Chesser Deposition, page 127). After their meetings, Mr. Chesser testified that he and Mr. Green "had a general conversation that said that we both had a favorable impression from the meetings." (Chesser Deposition, page 139). Mr. Green went even farther: he said that Mr. Chesser reported back "similar support" from both Kansas and Missouri regulators. (Exhibit 203, page 1).

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In an email dated November 22, 2006 from Rick Green to the Aquila board, Mr. Green stated:

Before signing a definitive agreement, [Great Plains] will seek informal indications from the Missouri Public Service Commission that they will be allowed to retain a "significant" portion of synergies as well as extend their Iatan II regulatory compact to Aquila's Iatan II interest…. (Exhibit 302, page 1).

These discussions with regulators were so critically important that they share equal weight with the due diligence efforts:

The result of the Phase II due diligence and discussions with regulators could result in one of three outcomes. We could confirm our original bid range and finalize a bid within that range, we could reduce or increase our original bid, or we could decide not to proceed with a final bid submission. (Exhibit 101, page 3).

GPE, KCPL and Aquila's Response to OPC's Motion

Great Plains Energy, Inc.("GPE"), Kansas City Power and Light Company ("KCPL") and Aquila, Inc. ("Aquila") (Collectively "Applicants") immediately observe that the executives of GPE testified under oath that they **"asked for no commitment and we received no commitment from either the Staff or the Commissioners."** (See Michael J. Chesser Deposition at 40. See also William H. Downey Deposition at 42). Applicants further note that the meetings occurred months before this proceeding was filed on April 4, 2007. Applicants, relying on direct quotes from the executives without extrapolation, observe:

> Michael J. Chesser, Chairman of the Board of Directors of Great Plains Energy, testified in his deposition that he advised Commissioners that "we were going to pursue the acquisition of Aquila." (See Chesser Dep. at 39). Mr. Chesser was accompanied by William H. Downey, Chief Operating Officer of Great Plains Energy and President of KCPL, and Chris Giles, Vice President of Regulatory Affairs for KCPL. (Id. at 38).
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> Mr. Chesser stated that they informed the Commissioners about three primary "support mechanisms" for the transaction, which included a split of synergies for the first five years, with all additional savings thereafter going to the customer; the ability to recover actual interest costs in future rate case; and the use of an amortization mechanism in view of Aquila's investment requirements and the need to maintain Aquila's expected post-merger investment grade credit rating. (Id. at 39-40).
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> In his deposition Mr. Downey stated that the meetings with commissioners were at a "very high level … just simply there to talk more about the fact that we were going to do this." (See Downey Dep. at 41). He noted that "[w]e didn't hear any major objections to the overall concept," and the only feedback received from Commissioners was "[a]cknowledgment, appreciation for us coming in and briefing them ahead of time." (Id. at 42-

> 43). “We didn’t ask for anything, so we wouldn’t have gotten a commitment.” (Id. at 42). No documents were provided to Commissioners during the meetings. (Id. at 44. See also Chesser Dep. at 42).
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> During the bidding process Great Plains Energy was not able to implement a collaborative process with Commissioners and Staff as it did with its Comprehensive Energy Plan because of the highly sensitive nature of that process and its negotiations. (Tr. 150-51, 838-39, 875-77). However, after it was selected as the final bidder, Great Plains Energy and Aquila agreed that discussions with the regulators could take place. (Tr. 839, 875-77).
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> Contrary to OPC’s suggestion, the discussions with “regulators” were always meant to include both Commissioners and Staff.
> “Q. You said that we met with regulators. Who was it that met with regulators?
> A. I believe it was Bill Downey, myself and Chris Giles.
> Q. When was that meeting, let’s say with the Missouri commissioners? Or Missouri regulators?
> A. I believe it was in mid January.
> Q. And who was is that you met with specifically?
> A. We met with I believe each of the commissioners and key members of the Missouri staff.” (See Chesser Dep. at 38. See also Downey Dep. at 38).

Applicants further noted that: “Several of the documents cited by OPC were created early in this process and do refer to ‘informal discussions with regulators.’ See Ex. 101 (Dep. Ex. 26) at 3, T. Bassham Memorandum to Great Plains Energy Board of Directors (July 19, 2006); Ex. 121 (Dep. Ex. 5) at 3, M. Chesser Final Non- Binding Bid Letter to Lehman Brothers and Blackstone Group (Nov. 21, 2006).”

> As Mr. Chesser noted, that collaborative process did not occur, and instead simple courtesy visits were paid to

the Commissioners. (Tr. 884). At the hearing, Mr. Chesser stated that the “primary purpose” was “to educate the commissioners about what was about to happen” with regard to the announcement of the merger. (See Tr. 842). He stated that while he “wanted to hear if there were any major objections that we were not aware of to this kind of a deal being considered,” during the meetings “I heard nothing, we had no conversation around that.” (Id.). He stated that Great Plains Energy officials did not communicate to the Commissioners that if they had a problem, they should let them know. (Id. at 843). “I expected if there was a problem, they would make that known to us.” Id. at 844. While the Great Plains Energy officials did not hear anything “significantly negative,” Mr. Chesser clarified that the “depth of discussion did not go to asking or receiving commitments.” (Id. at 141). “We weren’t looking for … specific feedback.” (Id. at 146).

Mr. Downey testified at the hearing as well, noting that “we were there to educate and to listen carefully to see if there were any reactions of a negative nature that we ought to take and keep in mind as we moved forward.” (Tr. 911). The meetings were “typical,” based upon Mr. Downey’s 35-year experience in the industry at KCPL and at Commonwealth Edison Co. (Tr. 936-38). When “you’re a regulated utility and you’re about to embark on something that will have significant impact on the institution” and “ultimately involve the regulator,” “you would let them know” your plans. (Tr. 977-78). Therefore, “we came over here to brief the Commissioners, and we intended in parallel to brief the Staff ….” (Id. at 978).

At his deposition Mr. Chesser emphasized: “We asked for no commitment and we received no commitment from either the Staff or the Commissioners.” (See Chesser Dep. at 40). While Mr. Chesser advised that “we did not get a sense that there were any major

> objections," "we got into no details, no specifics, we got no commitments." (Id. at 38). He continued: "We got the sense that the devil is in the detail, but conceptually it was a good thing. And conceptually it would be better for Aquila to be acquired by a utility from within the state than a utility from outside the state. That is the sense that I got." (Id. at 38).
>
> Emphasizing that no commitment was sought or offered at the meetings with Commissioners, Mr. Chesser concluded "that they were going to look at the merits of the deal." (Tr. at 844).

Analysis of Public Counsel's Motion.

In order for OPC to succeed on its motion it must provide a sufficient factual basis to overcome the presumption that administrative decision-makers act honestly and impartially.[27] To establish actual bias on the part of the Commissioners, OPC must prove that the Commissioners have formulated an "unalterable prejudgment of the operative adjudicative facts of the case."[28] To establish an appearance of impropriety, OPC would have to prove that a reasonable person, giving due regard to the presumption of honesty and impartiality, and who knows all that has been said and done in the presence of the Commissioners would doubt the impartiality of the Commission.[29] Being "impartial" is defined as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair and just."[30]

At various points in OPC's motion it refers to the communications the Commissioners had with the company executives as being either *ex parte* or else some other form of communication. Black's Law Dictionary defines *ex parte* as meaning: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only."[31] In order for a contact or action to be associated with one party, there must, obviously, be a "party" to an action, and there must be an action or case

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[27] *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919-920 (Mo. App. 2003); *Burgdorf v. Bd. of Police Comm'rs,* 936 S.W.2d 227, 234 (Mo. App. 1996).
[28] *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. 1990).
[29] *State v. Kinder,* 942 S.W.2d 313, *321 (Mo. banc 1996).
[30] *Black's Law Dictionary*, 6th Edition, West Publishing Company, 1990, p. 752.
[31] *Black's Law Dictionary*, 6th Ed., West Publishing Company, 1990, p. 576.

actually filed and pending, not speculatively looming in the distance. Any contact or communication with an individual, group or entity when there is no existing case, by definition, is not an *ex parte* contact.

Just to be clear, the communications between the Commissioners and the corporate executives that are the subject of OPC's Motion to Dismiss were not *ex parte* contacts. These communications occurred months before the merger case was filed, there was no adversarial or contested proceeding before the Commission at that time, and there were no parties to any action for which there could be a one-sided communication. Consequently, Commission Rule 4 CSR 240-4.020 does not apply to these communications and is, in fact, totally irrelevant to this discussion.[32]

The communications that occurred between the Commissioners and corporate executives were fully authorized and sanctioned by Missouri's General Assembly pursuant to Sections 386.210.1 and .2, RSMo Cum. Supp. 2006. Curiously, OPC implies the communications were somehow illicit without explaining how a statutorily authorized meeting violates any code of conduct, much less the statute authorizing that contact. Notably, the Judicial Canons upon which OPC so heavily relies provides an exception for communications that are expressly authorized by law,[33] and there is no question that these types of communications are expressly authorized by Sections 386.210.1 and .2.[34]

Public Counsel apparently asserts that the upbeat recitations concerning the tone of the meetings made by the corporate executives constitutes reliable and credible evidence of unlawful promises by the Commissioners. Each of these witnesses denied under oath that any Commissioner made any representation about the outcome of the merger application prior to the case being filed, or any time thereafter. Indeed, Mr. Chesser and Mr. Downey repetitively testified that they did not seek a prior commitment from the Commissioners, and none was offered by the Commissioners. In the record, it appears that OPC does not challenge the credibility of this testimony. OPC does not point to any prior inconsistent statements on the part of these witnesses. In short,

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[32] See 4 CSR 240-4.020(7).

[33] Supreme Court Rule 2.03, Canon 3(B)(7)(e).

[34] The Commission does not concede that the Judicial Canons would apply in this instance, however, even if they do apply, OPC fails to provide any evidence that the Canons were violated.

OPC provides no evidence to contradict or diminish the substantial and credible evidence that during the statutorily authorized meetings the corporate officers who participated asked for no commitment and received no commitment from either the Commission's Staff or the Commissioners.

OPC does not provide even a single example of Commissioners Murray, Appling, and Clayton indicating by comment or conduct that she or he was biased or prejudiced in this case. OPC does not assert that any of these Commissioners has an improper interest in the case that would require recusal. OPC does not offer any factual evidence that any of these Commissioners were determined to reach a particular result regardless of the evidence.[35]

It would appear that OPC has taken the depositions, exhibits and testimony in this matter, cut them into small pieces and woven the words of its choosing together with the magic thread of innuendo in order to conclude that something clandestine and prejudicial must have occurred. In short, OPC offers no legitimate factual basis from evidence in the record to support a conclusion of actual bias or prejudgment on the part of the Commissioners.

Similarly, no reasonable person with total knowledge of the content of these conversations, the context surrounding the legislatively sanctioned conversations, and the timing of the conversations could conclude the Commissioners were biased or that there was even a remote appearance of impropriety. This is not an extreme case where disqualification is constitutionally required, and the Commissioners have an affirmative duty not to disqualify themselves unnecessarily.[36]

The Commission further notes that OPC's poorly worded and incorrect assertion (Paragraph 19) that utility companies have access to Commissioners not available to ratepayers and thus have undue influence over the Commission is a flat misrepresentation. Commissioners regularly speak with OPC or its employees, legislators, local government officials, the media, environmental advocates, advocates for low-income customers, representatives of industrial customers, and on occasion, individual residential ratepayers.

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[35] *Ross v. Robb*, 662 S.W.2d 257, 260 (Mo. banc 1984); *Shepard v. South Harrison R-II School District,* 718 S.W.2d 195, 199 (Mo. App. 1986).
[36] *Bates*, 922 S.W.2d at 431.

OPC finally asserts, without citation, that the rule of necessity would not require further consideration of the case. The case law demonstrates that OPC is wrong. The Missouri Court of Appeals has held:

> In those instances where the only forum authorized by statute would be unable to proceed, the Rule of Necessity could be invoked to permit a decision to be made by the adjudicating body in spite of its possible bias or self-interest. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980).[37]

In any event, the Rule of Necessity does not even come into play in this instance where none of the Commissioners that are the subject of OPC's Motion are required to recuse. There is a quorum of unbiased Commissioners, who have impeccably maintained their honesty, integrity and impartiality, prior to, and throughout this proceeding.

Conclusion

The Canons of Judicial Conduct and the Commission's Standard of Conduct Rules, are not, and were never intended to be, vehicles for third party control of an agency's agenda. The preamble to the Canons states: "Furthermore, the purpose of this Rule 2 would be subverted if it were invoked by lawyers for mere tactical advantage in a proceeding."[38] The purpose of Commission Rule 4 CSR 240-4.020 is to "insure that there is no question as to [the commission's] impartiality in reaching a decision on the whole record developed through open hearings." The purpose of these standards is not to allow attorneys, parties, corporate officers or their agents to arbitrarily obstruct the Commissioners' proper exercise of their quasi-judicial functions by initiating or entertaining statutorily authorized communications about matters concerning regulatory policy.

As noted above, OPC cites no comment or conduct by Commissioners Murray, Appling, and Clayton that would serve as a basis for recusal, nor is there evidence that the Commission has done anything to diminish public confidence in its work. Lacking any merit to

[37] *State ex rel. Powell v. Wallace*, 718 S.W.2d 545, 548 (Mo. App. 1986); accord, *Stonecipher v. Poplar Bluff R-1 School District*, 205 S.W.3d 325, 328 (Mo. App. 2006); *Fitzgerald*, 796 S.W.2d at 59-61. See also, *Central Missouri Plumbing Co. v. Plumbers Union Local 35*, 908 S.W.2d 366, 369-371 (Mo. App. 1995).

[38] Supreme Court Rule 2.01, Preamble.

its claims, it appears OPC is attempting to gain an improper tactical advantage by the inappropriate use of the Standard of Conduct Rules. Such action may actually serve more to erode the credibility of OPC before objective commentators and in the eyes of the public, which it is responsible to serve.

The General Assembly has astutely and comprehensively defined permitted communications with the Commission, balancing the Commission's and the public's need to inform themselves with parties' needs for an impartial adjudicator.[39] The Commission and its Commissioners have without question observed the requirements of this law.

IT IS ORDERED THAT:

1. The Office of the Public Counsel's December 13, 2007, Motion to Dismiss is denied as being meritless.

2. This order shall become effective on January 2, 2008.

Davis, Chm., abstains
Murray, Clayton, Appling, and
Jarrett, CC., concur.
Clayton, separate concurrence to follow.

Stearley, Regulatory Law Judge

NOTE: Other orders in this case can be found at pages 36 and 338.

[39] Moreover the General Assembly has provided the additional safeguard of judicial review of all of the Commission's decisions. Section 386.510, and 386.540, RSMo 2000.

COMMISSIONER CLAYTON'S OPINION AND RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

This Commissioner concurs in the Order Denying Motion To Dismiss filed by the majority and further wishes to respond to allegations made by the Office of Public Counsel (OPC) in his motion. Serious allegations have been lodged against the Commission and its members suggesting the occurrence of allegedly improper or illegal activity. This Commissioner supports the Order Denying Motion To Dismiss because it is based solidly in law, and the facts presented at hearing, thus far, suggest no wrongdoing on the part of three of the four Commissioners still in the case. This Commissioner must also respond directly to Public Counsel's assertions to assure the public of this Commissioner's impartiality, his lack of bias and his commitment to deciding every case fairly on the established record.

First and foremost, this Commissioner welcomes the scrutiny and attention given by the public, the press and the attorneys practicing before the Commission. The decisions rendered by this agency directly affect nearly all Missourians in the form of utility rates, environmental impact, economic development, and in citizens' basic health and welfare through safe and reliable utility service. Commission activities and decisions rarely receive wide-spread attention in the media and local public hearings held by the Commission attract a discouragingly small number of citizens to participate in a complex and serpentine administrative law process. Recently-enacted legislative changes, including statutes directly at issue in this case, have also gone relatively unnoticed as have legislative changes that have altered traditional methods of rate making with new surcharges for electric, water and gas utilities. Any opportunity to educate the public about the Commission is critically important.

In this case, OPC has challenged the impartiality of four Commissioners serving on the Commission. In support of his Motion To Dismiss, OPC cites the alleged occurrence of a day of meetings in which officials from Aquila and Great Plains appeared in Jefferson City to brief Commissioners on the potential for a future transaction involving the two utilities. OPC has alleged that these meetings were critically important for determining if and how the utilities

would proceed based on reactions from Commissioners during the meetings. OPC has cited a number of exhibits and deposition testimony that refer to informal discussions with regulators in Kansas and Missouri prior to the transaction agreements being executed. OPC suggests that the lack of objection raised by Commissioners or the tacit approval of the various rate making methodologies taint the pending process sufficiently to warrant dismissal.

Prior to the filing of his motion, OPC suggested on the record, in response to a letter from the Missouri Attorney General, that he would seek dismissal of the case because of allegedly improper conduct committed by Chairman Davis and Commissioners Murray, Appling and Clayton.[1] The pending motion before the Commission has specific application to three of the four Commissioners who remain in the case, including Commissioners Murray, Appling and Clayton.[2] Chairman Davis is no longer subject to the pending motion because he recused himself from the case on December 6, 2007. Because of that recusal, this Opinion will focus entirely on the allegations made against the three named Commissioners and does not address the merits of the allegations made against Chairman Davis. The evidence supporting allegations unique to Chairman Davis, including a number of e-mails filed as exhibits, is irrelevant to the analysis associated with the three remaining Commissioners.[3]

There are no specific references to Commissioners Murray, Appling or Clayton in any of the testimony, the depositions, written documents or exhibits. These Commissioners are never mentioned by name anywhere in the evidence. There is no written account of any of the meetings with these Commissioners. There is no evidence that any of these Commissioners made any specific commitment or even expressed any opinion. No documents were given to the Commissioners. There is no evidence of partiality in favor of the transaction or any evidence of prejudgment on the part of the three Commissioners at issue. There is no record that either of the corporate boards were ever advised of the three Commissioners' positions and

[1] Tr. at 993-995.
[2] Any reference to the language "these Commissioners" shall mean Commissioners Murray, Appling and Clayton, who are the remaining Commissioners in the case, subject to allegations of improper communications.
[3] *See* Union Electric Co. v. Public Service Com., 591 S.W.2d 134 (Mo. Ct. App.1979).

the record does not reflect any commitment for a time table for concluding this case by the three Commissioners. The totality of the evidence suggests a vague discussion, if any actually occurred.

It is important to review the record and identify the actual allegations lodged against these Commissioners. First of all, the record reflects that these Commissioners never met with Richard Green, the CEO of Aquila, and his e-mails entered into evidence are devoid of any reference to any meeting with Commissioners Murray, Appling or Clayton.[4] They do not describe any meeting and, further, they do not outline any commitment, prejudgment or commentary on the positions of Commissioners Murray, Appling or Clayton.

In addition, the evidence of meetings among the Commissioners and Great Plains officials is vague and without detail. There are no Great Plains documents reflecting the nature or detail of any meetings with Commissioners. The only reference to any particular Commissioner in writing attributed to Great Plains comes second-hand in Deposition exhibit 18 and that Commissioner is no longer in the case. Great Plains refers to Commissioners as Missouri regulators and on several occasions confuses whether regulators includes Commissioners, Commission staff or both.[5]

OPC argues that Great Plains was required to get some sort of informal approval prior to the filing of the case and that any meetings held were designed to elicit feedback prior to closing the deal. Although OPC argues that these meetings were critically important for Great Plains, the evidence suggests that Great Plains officials cannot even remember the day of the meetings. Despite four days of testimony and the filing of multiple exhibits, documents and data requests, it is still unclear when these meetings took place. One reference to the record suggests that no meetings ever occurred,[6] another reference suggests a meeting date of Monday, January 8, 2007,[7] another reference is to January 17th [8] and yet another reference is to January 24th[9]. Great Plains continues to struggle with certainty in filing its response to OPC's motion by arguing that the meetings

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[4] Exhibits 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 51.
[5] Tr. at 839-841.
[6] Exhibit 107.
[7] Tr. at 842.
[8] Tr. at 876; Exhibit 106.
[9] Exhibits 104HC, 119HC and 304; Deposition Exhibit 18 (dated 11-27-07); Tr. at 859-860.

occurred either on January 17th or January 24th.[10] In response to the Commission's request for more certainty of dates, Great Plains estimated that "to the best of its knowledge," the meetings occurred on January 17th.[11]

Contrary to Great Plain's assertions that its staff met with "all of the Commissioners,"[12] this Commissioner has no recollection of ever meeting with any utility official regarding the merger transaction. This Commissioner has no record of any such meeting taking place on either date. This Commissioner has no memory of the various rate making provisions that allegedly support the transaction, including granting an acquisition premium in rates, authorizing enhanced regulatory amortizations or pre-authorizing a sharing of suggested synergy savings associated with the transaction. This Commissioner's first recollection of any merger discussion was receiving the press release issued by the companies and the notice to Wall Street investors, which included a webcast of utility officials.

This Commissioner believes that the Great Plains officials may be mistaken that they met with each of the Commissioners and their vague references to the meeting dates supports that possible mistake. Piecing together the evidence, it appears that Aquila CEO, Richard Green, and Great Plains CEO, Michael Chesser, split up responsibilities in meeting with Kansas and Missouri regulators.[13] Green had the obligation of meeting with the Chairman and several staff members.[14] Great Plains CEO, Mike Chesser, and his staff agreed supposedly to meet with all the other Commissioners.[15] The division of duties occurred on or about Tuesday, January 23, 2007, in a meeting between Mr. Chesser and Mr. Green and recounted in an e-mail also dated January 23, 2007.

> During the meeting, Mike [Chesser] and I came to agreement on the general logistics of "announcement day" as well as how we are going to meet with the

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[10] Applicant's Opposition to Motion To Dismiss dated December 26, 2007.
[11] Applicant's Response to Order Directing Filing dated December 28, 2007.
[12] Tr. at 860.
[13] Exhibit 1191-IC; Dep. Exhibit 18.
[14] *Id,*
[15] *Id.*

> Missouri and Kansas regulators. To start, we agreed I would call Chairman Jeff Davis, Wes Henderson (leader of the Missouri Commission Staff) and Bob Schallenberg (leader of the Missouri Commission Accounting Staff) and alert each that Mike and then I want to meet with them to discuss a potential combination of our two companies. I will do the same thing with Chairman Brian Moline of the Kansas Corporation Commission and Don Lowe (leader of the Kansas Corporation Commission Staff). The face to face meetings could happen as early as this week.
>
> I did speak with Chairman Davis this morning. He said he would make time to take the meetings. We have also scheduled a call tomorrow morning at 9 a.m. with Wes Henderson and Bob Schallenberg to set a date to brief them.[16]

The implication from the first paragraph quoted above is that no contacts had been made as of Tuesday, January 23, 2007. The e-mail suggests that these were the first arrangements at contacting anyone from the Missouri Commission—Commissioners or staff. It is not logical that the other Commissioners would have been briefed on January 17th, a week prior to the meeting with the Chairman.

Another e-mail dated Thursday, January 25, 2007, recounted in detail that Mr. Green held a relatively unsuccessful meeting by phone with several staff members and then held a meeting with the Chairman.[17] A follow up breakfast meeting between Green and Chesser was scheduled on Monday, January 29, 2007, to further discuss their progress.

Finally, the third e-mail from Mr. Green is dated Wednesday, January 31, 2007. He refers to his contacts in Kansas and to contacts with the Missouri Chairman. Mr. Green also refers to his follow up conversations with Mr. Chesser, possibly from the breakfast meeting of Monday, January 29th referenced in the second e-mail, in which he recounted details of Mr. Chesser's meetings. This

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[16] Exhibit 119HC.
17 Deposition Exhibit 18.

e-mail reflects, second-hand through Mr. Green, that Mr. Chesser held meetings in Kansas and Missouri. Speaking of Mr. Chesser to the Aquila Board, Mr. Green writes that, "I also had another meeting with Mike Chesser. He confirmed that [Great Plains] received the same mixed signals in Jefferson City." Mr. Green then explained Mr. Chesser's concerns with the Commission staff and their supposed lack of support for their plan. Commissioners Murray, Appling and Clayton are neither referenced individually nor are their reactions to the merger plan.[18]

Lastly, additional confirmation of the meeting date may be found in another document admitted into evidence. The document is a power point presentation by Great Plains management to the Board dated February 1, 2007. On page 3 of the presentation, entitled "Process Update," the author lists a number of items that had been completed or were pending. The second bullet point reads, "Giant (Great Plains) management met with KS & MO regulators on January 24th."[19] There is a conflict in the evidence on the date on which any Commissioner meetings were held.

Consequently, if the meetings occurred January 24th, it is impossible that this Commissioner participated. This Commissioner was out of the country during part of the week of January 22", including January 24th. It would have been a physical impossibility for this Commissioner to have participated in any meeting on that day. Alternatively, if the meeting took place on January 17th, this Commissioner could have participated, although there is no record of any meeting and this Commissioner has no recollection of the meeting.

Regardless, even if the 10 — 15 minute meetings had taken place, there is absolutely no evidence of wrongdoing or inappropriate conduct on the part of these Commissioners. As the majority Order reflects, since 2003 and the passage of SS SCS HB 208, these meetings have been specifically authorized and approved by the Missouri General Assembly. This Commissioner was appointed in 2003 and has served under the current regulatory or legal framework for nearly his entire term, which specifically authorizes such communications.

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[18] Exhibit 304.
[19] Exhibit 104HC.

The majority Order correctly cites the applicable law with regard to communications among parties and Commissioners. Section 386.210 clearly and unambiguously authorizes the meetings that may or may not have occurred between the three remaining Commissioners. Section 1 reads that,

> The commission may confer in person, or by correspondence, by attending conventions, or in any other way, with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official agency or instrumentality thereof, on any matter relating to the performance of its duties.

The statute offers further guidance in section 2 which reads,

> 2. Such communications may address any issue that <u>at the time of such communication is not the subject of a case that has been filed with the commission.</u> (emphasis added).[20]

OPC and Interveners completely ignore this section in their pleadings. Since the case was not filed until April and was not pending during the alleged meetings, the communication cannot be considered improper. Absent some additional evidence suggesting partiality or bias, OPC's motion must fail.

Whether this activity is appropriate or not is another question. The public deserves to have confidence in those who hold the public trust and this case suggests that such meetings, while legally and statutorily authorized, may lead to cynicism and a significant lack of confidence in Commission business. This is at a time when the Commission cannot afford to lose credibility. Utility issues have moved to the forefront in terms of the regular filing of rate cases, recurrent power outages suggesting a need for new reliability standards, higher fuel costs, the implications from Washington on climate policy as well as other controversies at the

[20] §386210, RSMo. Supp. 2007.

Commission. The presence of these issues is causing the public to carefully watch the business of the Commission and the conduct of the Commissioners.

This Commissioner welcomes the public dialogue regarding Commission ethics and practice which may include a discussion on proposals for a new rule making, proposals to amend state statute or inquiries by the Missouri Senate. This Commissioner notes that any potential revisions to Commission practice or procedure should be to encourage more public disclosure of communications among all parties and Commissioners. However, several proposals solely address communications among utilities and Commissioners and do not make similar demands on interveners, the staff of the Commission or OPC, who may also communicate with Commissioners. Since the Commission is a tribunal expected to fairly balance the interests of all the parties in rendering a decision in a case, all parties should be equally treated with regard to all communications and dealings with Commissioners. It is disingenuous for movants to demand more disclosure of utility contacts while not suggesting similar treatment for themselves.[21] This disclosure must also balance the need for Commissioners to be knowledgeable about utility issues without compromising the due process of potential adverse parties in cases.

This Commissioner has a record that is free from partiality reflecting independence in decisions. This Commissioner intends to decide this case, as in all other cases, based on the record before the Commission. Many questions need to be asked and answered by the parties and the witnesses. Only after thoughtful study of the record and a full evaluation of the impact on the public and the parties can a decision be made. That is how the process is supposed to work. This Commissioner intends to see this case through to its conclusion in the manner required by statute, rule and canon.

For the foregoing reasons, this Commissioner concurs.

[21] *See* Case Number AX-2008-0201.

In the Matter of the Review of the Competitive Classification of the Exchanges of Spectra Communications Group, LLC, d/b/a CenturyTel.

Case No. IO-2008-0097
Decided January 15, 2008

Telecommunications §40. The Commission found that competition continued to exist in the exchanges of Spectra Communications Group, LLC, d/b/a CenturyTel that the Commission previously found to be competitive.

ORDER APPROVING STIPULATION AND AGREEMENT AND FINDING CONTINUED COMPETITION IN CERTAIN EXCHANGES OF SPECTRA COMMUNICATIONS GROUP, LLC, D/B/A CENTURYTEL

On October 4, 2007, the Staff of the Missouri Public Service Commission filed a report pursuant to Section 392.245.5, RSMo Supp. 2006, regarding continued competitive classification for Spectra Communications Group, LLC, d/b/a CenturyTel's competitively classified exchanges. Staff concluded that competition continues to exist in Spectra's competitively classified exchanges and recommended that the Commission make a finding of that fact. The Commission issued notice of the Staff's report and established October 30, 2007, as the deadline for the filing of applications to intervene. No such applications were filed.

Acting on a request for hearing made by the Office of the Public Counsel, the Commission scheduled a procedural conference for November 27, 2007. At that conference, the presiding officer ordered the parties to file a proposed procedural schedule. On November 28, 2007, Staff filed a motion to establish December 13 as the deadline for filings by the parties and December 20 as the hearing date. The Commission adopted the suggested schedule.

On December 13, 2007, Spectra, Staff, and Public Counsel filed a unanimous stipulation and agreement. In that stipulation, all parties agree that the Commission may consider the previously filed verified Staff report in this case as evidence to determine whether competitive conditions continue to exist in the Spectra exchanges previously granted competitive classification. Staff and Spectra further stipulate that Staff's report demonstrates the continued existence of competitive conditions in those exchanges and that such exchanges should remain classified as competitive. Public Counsel did not join that part of the stipulation, but

stipulated that it does not object to Staff and Spectra's stipulation and will not offer any evidence in opposition to that stipulation. On December 14, 2007, Public Counsel filed a pleading stating that it waived its right to a hearing in this case. The Commission therefore canceled the scheduled hearing.

On January 10, 2008, Staff filed a motion requesting to amend its staff report. Staff stated that it had inadvertently listed Charter Fiberlink–Missouri, LLC, as the competitive local exchange carrier (CLEC) providing local service to residential customers in Spectra's Savannah exchange. Staff requested that its report be corrected to show that NPG Digital Phone, Inc., is providing facilities-based residential voice service to more than two customers in the Savannah exchange. Staff supported its information with the Affidavit of Linda McNeiley, Assistant Controller for NPG Digital Phone, Inc. The Commission shall grant Staff's motion.

Section 392.245.5(6), RSMo Supp. 2006, requires the Commission to review the status of competition in exchanges previously designated as competitive. That review is to be conducted at least every two years. The statutorily established standard for determining whether competition continues to exist in those Spectra exchanges previously designated as competitive is very straightforward. Competition is defined to exist in those exchanges if at least two nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to customers. Staff's verified report, which the parties stipulate may be considered as evidence, indicates the statutory standard continues to be met in Spectra's competitively classified exchanges.

On the basis of Staff's verified report and the stipulation and agreement of Staff and Spectra, to which no party objects, the Commission finds that competition as defined by Section 392.245.5, RSMo Supp. 2006, continues to exist in those exchanges of Spectra that the Commission previously classified as competitive.

IT IS ORDERED THAT:

1. The Motion to Amend Staff Report filed on January 10, 2008, is granted.

2. The Stipulation and Agreement filed by Spectra Communications Group, LLC, d/b/a CenturyTel, the Staff of the Commission, and the Office of the Public Counsel is approved.

3. The Commission finds that competition, as defined by Section 392.245.5, RSMo Supp. 2006, continues to exist in those

exchanges of Spectra Communications Group, LLC, d/b/a CenturyTel, that the Commission previously classified as competitive.

4. This order shall become effective on January 25, 2008.

5. This case may be closed on January 26, 2008.

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur.
Clayton, C., concurs; a separate
concurring opinion may follow.

Dippell, Deputy Chief Regulatory Law Judge

Notes: At time of publication, no opinion has been filed.

The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Review of the Competitive Classification of the Exchanges of CenturyTel of Missouri, LLC.

Case No. IO-2008-0096
Decided January 15, 2008

Telecommunications §40. The Commission found that competition continued to exist in the exchanges of CenturyTel that the Commission previously found to be competitive.

ORDER APPROVING STIPULATION AND AGREEMENT AND FINDING CONTINUED COMPETITION IN CERTAIN EXCHANGES OF CENTURYTEL OF MISSOURI, LLC

On October 4, 2007, the Staff of the Missouri Public Service Commission filed a report pursuant to Section 392.245.5, RSMo Supp. 2006, regarding continued competitive classification for CenturyTel of Missouri, LLC's competitively classified exchanges. Staff concluded that competition continues to exist in CenturyTel's competitively classified exchanges and recommended that the Commission make a finding of that fact. The Commission issued notice of the Staff's report and established October 30, 2007, as the deadline for the filing of applications to intervene. No such applications were filed.

Acting on a request for hearing made by the Office of the Public Counsel, the Commission scheduled a procedural conference for

November 27, 2007. At that conference, the presiding officer ordered the parties to file a proposed procedural schedule. On November 28, 2007, Staff filed a motion to establish December 13 as the deadline for filings by the parties and December 20 as the hearing date. The Commission adopted the suggested schedule.

On December 13, 2007, CenturyTel, Staff, and Public Counsel filed a unanimous stipulation and agreement. In that stipulation, all parties agree that the Commission may consider the previously filed verified Staff report in this case as evidence to determine whether competitive conditions continue to exist in the CenturyTel exchanges previously granted competitive classification. Staff and CenturyTel further stipulate that Staff's report demonstrates the continued existence of competitive conditions in those exchanges and that such exchanges should remain classified as competitive. Public Counsel did not join that part of the stipulation, but stipulated that it does not object to Staff and CenturyTel's stipulation and will not offer any evidence in opposition to that stipulation. On December 14, 2007, Public Counsel filed a pleading stating that it waived its right to a hearing in this case. The Commission therefore canceled the scheduled hearing.

Section 392.245.5(6), RSMo Supp. 2006, requires the Commission to review the status of competition in exchanges previously designated as competitive. That review is to be conducted at least every two years. The statutorily established standard for determining whether competition continues to exist in those CenturyTel exchanges previously designated as competitive is very straightforward. Competition is defined to exist in those exchanges if at least two nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to customers. Staff's verified report, which the parties stipulate may be considered as evidence, indicates the statutory standard continues to be met in CenturyTel's competitively classified exchanges.

On the basis of Staff's verified report and the stipulation and agreement of Staff and CenturyTel, to which no party objects, the Commission finds that competition as defined by Section 392.245.5, RSMo Supp. 2006, continues to exist in those exchanges of CenturyTel that the Commission previously classified as competitive.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed by CenturyTel of Missouri, LLC, the Staff of the Commission, and the Office of the Public Counsel is approved.

2. The Commission finds that competition, as defined by Section 392.245.5, RSMo Supp. 2006, continues to exist in those exchanges of CenturyTel of Missouri, LLC, that the Commission previously classified as competitive.

3. This order shall become effective on January 25, 2008.

4. This case may be closed on January 26, 2008.

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief

Case No. EM-2007-0374
Decided January 24, 2008

Evidence, Practice And Procedure §2. The Commission found this motion for reconsideration to be a trivial re-argument of the Office of the Public Counsel's previous motion. Even if OPC's position was accurate, impropriety on the part of the Commission does not prevent a case from continuing, rather, under Missouri's Rule of Necessity, the adjudication must proceed, and the decision will be subject to heightened scrutiny on judicial review.

ORDER DENYING MOTION FOR RECONSIDERATION

On December 13, 2007, the Office of the Public Counsel ("OPC") filed a pleading styled "Motion to Dismiss." That motion was denied on January 2, 2008. On January 11, 2008, OPC filed a motion for reconsideration of the Commission's denial of their motion to dismiss.
The Commission could address OPC's motion point-by-point, but the Commission finds that OPC has added little more than additional verbiage to its original motion to dismiss this matter. The Commission

found OPC's original motion to be meritless and the re-argument of its same positions is equally meritless.

Moreover, just as Staff noted in its response to OPC's Motion for Reconsideration, the Commission also notes:

> Assuming, *arguendo*, that Public Counsel's predicate is accurate, dismissal is not the result. Public Counsel has not produced even a single Missouri case wherein a cause was dismissed because of an appearance of impropriety on the part of the tribunal. Instead, under Missouri's well-established Rule of Necessity, the adjudication must go forward and the decision will be subject to heightened scrutiny on judicial review. *See Weinstock v. Holden,* 995 S.W.2d 408, 410 (Mo. banc 1999); *Rose v. State Board of Registration for the Healing Arts,* 397 S.W.2d 570, 575 (Mo. 1965); *Stonecipher v. Poplar Bluff R1 School District,* 205 S.W.3d 326, 328 (Mo. App., S.D. 2006).

The Commission further observes that the statutory mandate of Section 393.190 requires the Joint Applicants to seek approval of their merger from the Commission.

Because there is no other forum in which the Joint Applicants may seek approval of their requested merger application, and because the Rule of Necessity would apply and prevent dismissal even if OPC was correct in its assertions, **which it is not**, OPC's Motion for Reconsideration of the denial of its Motion to Dismiss is meritless.[1]

IT IS ORDERED THAT:

1. The Office of the Public Counsel's January 11, 2008, Motion for Reconsideration is denied as being meritless.
2. This order shall become effective on January 24, 2008.

Davis, Chm., not participating.
Murray, Appling, and Jarrett, CC., concur.
Clayton, C., dissents, with separate dissenting

[1] OPC acknowledges in paragraph 7 of its Motion For Reconsideration the proper application of the Rule of Necessity. Consequently, OPC must be aware of the frivolous nature of its motions.

opinion to follow.

Stearley, Regulatory Law Judge

DISSENTING OPINION OF COMISSIONER
ROBERT M. CLAYTON III

This Commissioner dissents from the Order Denying Motion for Reconsideration of the Order Regarding Responses to the Motion for Partial Summary Determination. The Commission has a duty to efficiently process cases pending before it in a timely fashion and the public expects that we will address the merits of the proposal with detailed findings and issue a decision in favor or opposed to the transaction. While settlement talks should always be encouraged and part of the process, this case is wandering without any direction. This Commissioner disagrees with the suspension of the proceedings from December that was ordered by delegation (without a vote of the Commission). The applicants should be held to their burden in the case filed on April 4, 2007, or the Commission should consider the proposal abandoned and dismiss it for want of prosecution.

This Commission, at the very least, should immediately address the Motion for Partial Summary Determination that was filed on December 5, 2007. If the parties agree that the question is entirely a matter of law, then there is no reason to wait to decide that Motion. The Applicants and the parties should be required to file their responses within ten days so the Commission can render a decision. This Commissioner would have preferred granting the Office of Public Counsel's Motion for Reconsideration and ordering the parties to respond to the Motion for Partial Summary Determination so the Commission can rule on the Motion. It appears that this Motion was filed in response to Commissioner inquiries and should not be ignored.

The majority suggests that since there may be a new "alternative" plan filed on January 31, 2008, it would be a waste of time to consider the Motion. This Commissioner disagrees. If the parties fail to settle the case in its entirety, then this Commission will be faced with the original case and merger request. Procedurally, the case would then be reset for evidentiary hearing. In that event, the issue of regulatory amortizations will still be at issue and the Motion will need to be addressed.

If the applicants have decided to abandon their original-proposal, this case should be dismissed for want of prosecution. Any new plan should be filed in a new case with new pleadings, reports and testimony and the current case should be closed or dismissed. If the "alternative plan" fails to attract a unanimous settlement and the Applicants wish to take up the original proposal, then there remains much work and study to be done.

This case has been pending since April 4, 2007, and the parties have had the opportunity for settlement discussions well before the evidentiary hearing began on December 3, 2007. The parties should have filed a more specific procedural schedule on December 21, 2007, as directed by the regulatory law judge, with a suggested plan of how the case should proceed. Instead, this Commission is being asked to delay and defer to others on important regulatory policies.

For the foregoing reasons, this Commissioner dissents.

In the Matter of the Determination of the Weighted, Statewide Average Rate of Nonwireless Basic Local Telecommunications Services

Case No. TO-2006-0084
Decided January 24, 2008

Telecommunications §14. The Commission determined that the weighted, statewide average rate of nonwireless basic local telecommunications services was $11.49 for residential customers, $29.77 for business customers, and $14.66 overall.

ORDER DETERMINING STATEWIDE AVERAGE RATE AND CLOSING CASE

Pursuant to Section 392.245(13), RSMo (Cum. Supp. 2006), the Commission opened this matter on August 29, 2005 to determine the weighted, statewide average rate of nonwireless basic local telecommunications services. Since that time, the Staff of the Commission has surveyed telecommunications carriers in Missouri to determine their rates as of August 28, 2007.

On December 19, 2007, the Staff filed its Report for 2007, in which it stated it found the statewide average rates to be $11.49 for residential customers, $29.77 for business customers and $14.66

overall. The Staff provided the information on which it based its determination.

IT IS ORDERED THAT:

1. The Commission determines the statewide average rates to be $11.49 for residential customers, $29.77 for business customers, and $14.66 overall.

2. The Public Information Office of the Missouri Public Service Commission shall provide notice of this order to the Members of the General Assembly.

2.[*sic*] This order shall become effective on January 24, 2008.

3. This case may be closed on January 25, 2008.

Davis, Chm., Murray, Clayton,
and Jarrett, CC., concur.
Clayton, C., concur, with
concurring opinion to follow.

Dale, Chief Regulatory Law Judge

NOTE: At time of publication, no opinion has been filed.

In the Matter of the Application of Ozark Energy Partners, LLC for a Certificate of Convenience and Necessity to Construct and Operate an Intrastate Natural Gas Pipeline and Gas Utility to Serve Portions of the Missouri Counties of Christian, Stone and Taney, and for Establishment of Utility Rates

Case No. GA-2006-0561
Decided February 5, 2008

Gas §3. The Commission ordered that Ozark Energy Partners, LLC be granted a conditional certificate of convenience and necessity. The condition set out by the Commission is that Ozark Energy partners, LLC must submit acceptable financing to the Commission. The Commission further ordered that Ozark not begin construction of any facility in Missouri for the purpose of offering natural gas until it has obtained approval of its financing and a "full" certificate of public convenience and necessity from the Missouri Public Service Commission.

APPEARANCES

William D. Steinmeier and Mary Ann (Garr) Young, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110, Attorneys for Ozark Energy Partners, LLC.

James M. Fischer and Larry W. Dority, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, Attorneys for Southern Missouri Gas Company, LP. d/b/a Southern Missouri Natural Gas.

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Lera L. Shemwell, Deputy General Counsel, Missouri Public Service commission, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102, Attorney for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kennard L. Jones, Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission grants a certificate of convenience and necessity to Ozark Energy Partners, LLC. To ensure that the company is viable and is able to do what the certificate authorizes the company to do, the Commission, however, grants such authority under certain conditions.

Background

Ozark Energy Partners, LLC filed an application for a Certificate of Convenience and Necessity to construct and operate a natural gas pipeline in portions of Christian, Stone and Taney Counties. The company filed its application in June of 2006, and filed supplements in November of 2006, and February and September of 2007. During the course of the proceedings, Southern Missouri Gas Company d/b/a Southern Missouri Natural Gas and Missouri Gas Energy, a Division of Southern Union Company were granted intervention. In November of 2007, Ozark and the Staff of the Commission file a Stipulation and

Agreement. Southern Missouri opposed the Stipulation and Agreement and requested a hearing. Later in November, Ozark, Staff and MGE filed a second agreement; independent of the first. An evidentiary hearing was held on November 29, 2007. It is important to note that Southern Missouri has filed an application for approval of a certificate of convenience and necessity to serve portions of the same area that Ozark seeks to serve.[1] This order, however, discusses only the requirements relevant for the grant of such authority to Ozark.

Ozark's Application

Having filed its application, Ozark filed supplements that added cities to Ozark's proposed service area. The cities Ozark finally proposes to serve are; Hollister, Reeds Spring, Branson, Branson West, Highlandville, Spokane, Kimberling City and Galena.

Ozark explains in its application that no other gas company is providing service to the areas it seeks to serve. Ozark goes on to state that the proposed service area has a population of roughly 70,000, is host to more than 7,000,000 visitors per year and is one of the fastest growing areas in the state. The closest supply of natural gas to the area is more than 30 miles away.

Stipulation and Agreement between Ozark, MGE and Staff

Ozark, MGE and Staff filed an agreement generally stipulating that Ozark will not seek certification in areas being served by MGE nor will Ozark seek certification in any area in which MGE is seeking such authority. There has been no objection to this Agreement and, finding it reasonable, the Commission will approve the Agreement.

Stipulation and Agreement between Ozark and Staff

The Agreement between Ozark and Staff generally sets out conditions under which Ozark must operate if it is granted a certificate. However, all of the parties did not enter into that Agreement and Southern Missouri filed a timely objection to the Agreement. Under Commission rule, the agreement must therefore "be considered to be merely a position of the signatory parties to the stipulated position[s]" and no party is bound by those stipulations.[2] Because the Agreement is no longer considered an "Agreement" but merely a statement of the positions of the signatories, the Commission has no "Agreement" upon which to act. The Commission will, however, adopt those conditions set out in the Agreement as part of this order.

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[1] *See* Commission Case No. GA-2007-0168

[2] Commission rule 4 CSR 2-115 (D).

Because Southern Missouri requested a hearing in this matter, the Commission set this matter for hearing, heard evidence and makes the following findings of fact and conclusions of law. Of note, the Commission heard related facts and arguments during the hearing of Case No. GA-2007-0168. Because that case involved the same parties and many of the same witnesses, the Commission takes official notice of the evidence admitted in that case.

Conclusions of Law

The Commission shall have the power to grant the authority sought in Ozark's application upon a determination that such authority is necessary or convenient for the public service.[3] This issue has not been contested. All parties agree that gas service in the requested service area would be convenient and is necessary for the public service. In past cases, and now as a matter of policy, the Commission has set out certain criteria that must be met in order to grant a certificate of convenience and necessity.[4] Those criteria are set out below.

Findings of Fact

There must be a need for the service

All parties agree that there is a need for service. In Case No. GA-2007-0168, the mayor of Branson testified that there is a need for gas service.[5] Also, in this case, Mr. Epps testified that the area around Branson is growing[6] and that many workers are unable to afford propane on their wages.[7] Additionally, there is a population growth in the area and letters setting out the need for gas are included in the feasibility study filed by Ozark.[8]

In light of these facts and that no party argues otherwise, the Commission finds that there is a need for the service proposed by Ozark.

The applicant must be qualified to provide the proposed service.

Randy Hole, a principal in the company and whose resume is attached to Ozark's feasibility study, is a certified financial specialist, deeply knowledgeable of natural gas pipeline construction and finance.[9] Ralph Handlin, a partner in the company, has 49 years of natural gas

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[3] Section 393.170(3) RSMo 2000.
[4] In re. Ozark Natural Gas Company, 5 Mo. P.S.C. 3rd 143, 146 (1996). See also, In re. Tartan Energy Company, 3 Mo. P.S.C. 3rd 173, 177 (1994); In re. Intercon Gas, Inc., 30 Mo. P.S.C. (N.S.) 554, 561 (1991).
[5] Case No. GA-2007-0168, Tr. Page. 136, Line 9 – Page 137, Line 7.
[6] Tr. Page 158, Lines 2-5.
[7] Tr. Page 177, Lines 2-7.
[8] Exhibit 28 (NP) and 29 (HC).
[9] Tr. Page 164, Lines 14 -19.

engineering experience in four different states.[10] Mr. Handlin also manages a gas company on the west side of Missouri and in Oklahoma.[11] Dan Epps, Managing Director, has vast experience in excavating in the relevant region and is intimately familiar with the area.[12] Upon being granted the requested authority, Ozark intends to higher managers who will perform the day-to-day operations of the company.

With regard to construction of the facilities, Ozark intends to hire experienced personnel once the company is authorized by the Commission to provide service.[13] Further, Ozark has the benefit of expertise from Steven Cattron and Greg Pollard. Mr. Cattron is a strategic advisor for Ozark[14] and has experience with the Missouri Public Service Commission, Kansas City Power & Light Company and as President and Chief Operating Officer of MGE.[15] Mr. Pollard has a number of years in the natural gas business, including construction, service, maintenance, code compliance and engineering. He has also served as Vice President of MGE.[16]

The Commission finds that Ozark satisfies the criteria of being qualified to provide the proposed service.

<u>The applicant must have the financial ability to provide the service</u>

Ozark has set forth partners[17] and stated that it has established a number of contacts in the financing community that will provide access to both equity and debt financing.[18] However, because the Commission in this case will grant Ozark a certificate conditioned upon Ozark's later showing of financial viability, the grant of authority herein contemplated is not premised on Ozark's ability to obtain financing for this endeavor. The Commission therefore need not make any finding in this regard.

<u>The Applicant's proposal must be economically feasible</u>

Ozark's Feasibility Study is a useful tool in determining whether the proposal is feasible. However, there remains a high degree of risk associated with providing service to this area.[19] Whether the

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[10] Tr. Page 164, Lines 22-24.
[11] Tr. Page 165, Lines 1-2.
[12] Tr. Page 180, Lines 16-19 and Page 180, Line 23 – Page 181, Line 1.
[13] Exhibit 27 (HC), Pages 21-22.
[14] Tr. Case No. GA-2007-0168, Page 313, Lines 22-24.
[15] Tr. Case No. GA-2007-0168, Page 314, Lines 3-10.
[16] Exhibit 28 (Ozark's Feasibility Study), Page 58.
[17] Exhibit 28, Pages 53-55.
[18] Exhibit 28, Page 24
[19] Tr. Page 70, Lines 1-18.

proposal is economically feasible is a test better used in obtaining financing.[20] The Commission finds that its discussion in this regard is better suited for discussion regarding Ozark's ability to obtain financing and reserves its findings for that context. Securing financing would be overwhelming evidence that the proposal is economically feasible.

The service must promote the public interest

The public interest is promoted when there is competition. Natural gas in the proposed service areas will compete with propane, electricity and heating oil.[21] Additionally, the capital expenditures will benefit the public in the form of tax revenue, business development, employment and the added value of gas service.[22] The Commission also adds that if a service is convenient or necessary it intuitively must be in the public interest. The Commission therefore finds that the proposed service is in the public interest.

Discussion

The Commission has concluded that it is necessary and convenient for the public service that natural gas service be offered to the public in the proposed service areas. The Commission, however, is concerned about the ability of Ozark to obtain financing. Further, the Commission is concerned about Ozark's ability to remain well managed. To address these concerns, the Commission will grant Ozark a conditional certificate. The conditions are intended to ensure that the company is able to provide the intended service and that the company continues to so do once it is certified.

Additionally, there are a number of conditions included in the Agreement between Staff and Ozark. Because that agreement now represents the positions of the signatories thereto, the Commission considers the conditions therein to be conditions Staff would have recommended had Staff filed a Recommendation in this matter rather than the Agreement. This being so, the Commission will direct that Ozark comply with these conditions if it is "fully" certified.

Conclusion

Although the Commission will grant Ozark a certificate of convenience and necessity, the grant of such authority will be conditioned on Ozark submitting to the Commission acceptable financing for the proposal. Also, the Commission will condition Ozark's certificate on Ozark maintaining its level of management expertise. To further this

[20] Tr. Page 70, Lines 1-3.
[21] Tr. Page 101, Lines 17-23.
[22] Tr. Page 98, Lines 5-19.

end, the Commission will require that Ozark specifically include with its Annual Reports to the Commission information concerning the expertise of its current management.

IT IS ORDERED THAT:

1. Ozark Energy Partners, LLC is granted a conditional certificate of convenience and necessity, the condition of which is that Ozark submit acceptable financing to the Commission.

2. Ozark Energy Partners, LLC shall include with its Annual Reports information pertaining to the expertise of its management.

3. Ozark Energy Partners, LLC shall not begin construction of any facility in Missouri for the purpose of offering natural gas until it has obtained approval of its financing and a "full" certificate of public convenience and necessity from the Missouri Public Service Commission.

4. Ozark Energy Partners, LLC shall comply with the terms and conditions set out in the Stipulation and Agreement entered into between it and the Staff of the Commission.

5. The Stipulation and Agreement entered into between Ozark Energy Partners, LLC, Missouri Gas Energy, a division of Southern Union Company and the Staff of the Commission is approved.

6. The parties shall comply with the terms and conditions set out in the Stipulation and Agreement entered into between Ozark Energy Partners, LLC; Missouri Gas Energy, a division of Southern Union Company; and the Staff of the Commission.

7. This order shall become effective on February 15, 2008.

Davis, Chm., Clayton and Jarrett,
CC., concur;
Murray, C., dissents, with separate
dissenting opinion attached;
Appling, C., dissents;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 5th day of February, 2008.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I must dissent from the majority's decision to adopt the Report and Order in this case. Today, the Commission also adopted the Report and Order in Case No. GA-2007-0168, which grants a "conditional" Certificate of Convenience and Necessity to Southern Missouri Natural Gas Company for much of the same service area. In my opinion, the majority of the Commission has acted on a whim that may rise to the level of capriciousness by establishing a practice of granting multiple "conditional" Certificates of Convenience and Necessity for much of the same service area.

The Commission's decision in these cases has delayed the inevitable decision that the Commission must make of which company will best serve the public interest and be granted the "full" Certificates of Convenience and Necessity. In doing so, the Commission has placed Ozark Energy Partners, LLC and Southern Missouri Natural Gas Company in a costly race to determine who can obtain financing first and created a disadvantage to both companies when approaching financing institutions.

Ozark Energy Partners, LLC has shown its lack of sophistication and familiarity with Commission practice by agreeing "that if, at any time, it sells or otherwise disposes of its assets in a sale, merger, consolidation or liquidation transaction at a fair value less than its net original cost for those assets, the purchaser/new owner shall be expected to reflect those assets on OEP's [sic] books at its purchase price or the fair value of the assets, rather than at the net original cost of the assets." If this unprecedented provision is implemented, at such time Ozark Energy Partners, LLC wishes to sell its assets for less than its net original cost not only will the company be in financial trouble, but no other utility will be likely to acquire the assets.

Although the majority in the Findings of Fact cites Branson's Mayor as claiming that a need for gas service exists, Ozark Energy Partners, LLC does not have a franchise for the city of Branson and has no plans to serve Branson in the immediate future. Thus, the "need" the Mayor of Branson sought to remedy will not be answered by awarding Ozark Energy Partners, LLC a Certificate of Convenience and Necessity. Further, the Commission has failed to weigh the harm that could result to Branson and other areas of the region if a Certificate of Convenience and Necessity is granted to Ozark Energy Partners, LLC and its plan fails to come to fruition. For example, if Ozark Energy Partners, LLC finds that

only part of the awarded service area will be profitable and abandons the remaining area, other gas provider's may be unable to enter the region because of the lack of available service population. With Southern Missouri Natural Gas Company, the Commission has a proven utility to choose from that has a logical plan to serve all of the proposed area in the foreseeable future.

For these reasons, I do not support the vote to adopt the Report and Order granting a "conditional" Certificate of Convenience and Necessity to Ozark Energy Partners, LLC.

In the Matter of the Application of Alliance Gas Energy Corporation for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Branson, Branson West, Reeds Spring, and Hollister, Missouri

Case No. GA-2007-0168
Decided February 5, 2008

GAS § 3. The Commission granted Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Gas a conditional certificate of convenience and necessity to provide natural gas service to Branson, Branson West, Hollister, and the surrounding unincorporated area, conditioned upon the company's submission of financing arrangements the Commission finds acceptable and its acceptance of non-disposition accounting-related conditions similar to those recommended in the Stipulation and Agreement between Ozark Energy Partners, LLC and Staff in Case No. GA-2006-0561.

APPEARANCES

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Marc D. Poston, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri 65102, Attorney for the Office of the Public Counsel
Lera L. Shemwell, 200 Madison Street, P.O. Box 360, Jefferson City, Missouri 65102, Attorney for the Staff of the Missouri Public Service Commission
REGULATORY LAW JUDGE: Benjamin H. Lane, Judge

REPORT AND ORDER

Syllabus: *In this Report and Order, the Missouri Public Service Commission grants a conditional certificate of convenience and necessity to Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas.*

Procedural History

On October 26, 2006, Alliance Gas Energy Corporation ("AGE") filed an application with the Missouri Public Service Commission requesting that the Commission grant AGE authority to provide natural gas service to customers in four southwest Missouri communities (Branson, Branson West, Reeds Spring, and Hollister), all of which are located in either Stone or Taney County.

On November 2, 2006, the Commission issued notice of AGE's application to members of the public at large and other potentially interested parties and established an intervention deadline of December 4, 2006. On November 8 and November 30, 2006, respectively, Missouri Gas Energy ("MGE") and Ozark Energy Partners, LLC ("OEP") filed applications to intervene pursuant to Commission Rule 4 CSR 240-2.075, which governs intervention. The Commission granted those applications by order dated December 11, 2006. That order also directed Staff to promptly commence an investigation into the merits of AGE's application and to file monthly status reports informing the Commission of Staff's progress. Staff subsequently filed a series of monthly status reports, most of which emphasized that Staff had nothing new to report because Staff had requested, but not received, important additional information from AGE as required by Commission Rules 4 CSR 240-3.205(1)(A) and (1)(B), which was needed before Staff could complete its analysis and review of AGE's application.

On February 21, 2007, Southern Star Central Gas Pipeline, Inc. ("Southern Star") submitted a late-filed application to intervene in this case, which was granted by order dated March 6, 2007. On April 3,

2007, the Missouri Propane Gas Association also submitted a late-filed application to intervene, which was denied by order dated April 19, 2007.

On June 29, 2007, AGE and Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas ("SMNG") jointly moved to substitute SMNG as a party to this cause pursuant to an Asset Purchase Agreement dated June 29, 2007, under which AGE's interest in this case was effectively transferred to SMNG.[1] On July 11, 2007, the Commission entered an order granting the joint motion subject to certain conditions specified by Staff on July 9, 2007.

On July 20, 2007, SMNG advised the Commission that all previous filings made in this proceeding by AGE remained pertinent to the pending application given that SMNG would be effectively stepping into the shoes of AGE as the applicant in this proceeding. SMNG further advised the Commission that it would file a status report on or before August 11, 2007, indicating when it planned to file all remaining supplemental and updated information required to complete the application. On August 10, 2007, SMNG filed a First Amended Application and the required status report.[2] In its status report, SMNG advised the Commission that it believed the First Amended Application contained the supplemental and updated information necessary to complete its application. SMNG further advised the Commission that it intended to supplement the attachments to the First Amended Application as soon as it received additional local governmental approvals.[3]

In conjunction with its August 10, 2007 status report, SMNG asked the Commission,to schedule a prehearing conference, so the parties might propose a procedural schedule for resolving any issues in this case. On August 23, 2007, the Commission issued an order scheduling a prehearing conference for September 10, 2007 and

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[1] In their joint motion, AGE and SMNG tacitly acknowledged that the additional required information requested by Staff some six months earlier had not yet been supplied. SMNG did, however, indicate that it "intends to provide the Commission in the near future with the information needed to complete the Application filed by AGE."

[2] AGE had originally requested authority to provide natural gas service to customers in the municipalities of Branson, Branson West, Reeds Spring, Hollister, and the surrounding unincorporated areas. In the First Amended Application, however, SMNG withdrew its request for a certificate of convenience and necessity to serve Reeds Spring, since OEP was awarded the municipal franchise to serve this community. *See* First Amended Application at 3 n.2.

[3] SMNG filed a Supplement to Appendix A (HC) of the First Amended Application on August 21, 2007.

directing the parties to jointly prepare and file a proposed procedural schedule by no later than September 17, 2007. The prehearing conference was held as scheduled and on September 18, 2007, Staff and SMNG filed their joint Request for Extension of Time to File Proposed Procedural Schedule, which was granted by order dated September 19, 2007.

On October 24, 2007, SMNG filed a proposed procedural schedule on behalf of all the parties to this case, which included a proposed hearing date and time of November 27-28, 2007 beginning at 8:30 a.m. each day. The following day, the Commission adopted the proposed procedural schedule.

On November 5, 2007, SMNG filed its Second Amended Application. On November 13, 2007, OEP filed a motion to postpone the hearing. After a flurry of related filings, the Commission ultimately denied OEP's motion by order dated November 20, 2007. Staff filed its Position on the Issues on the morning of the first day of the evidentiary hearing, which commenced as previously scheduled on November 27, 2007 and concluded the following day. All parties but MGE and Southern Star filed posthearing briefs.[4]

Finally, SMNG and MGE filed a nonunanimous Stipulation and Agreement ("Agreement") on December 4, 2007. In paragraph 2 of the Agreement, SMNG voluntarily and expressly waived any right to request a Certificate of Convenience and Necessity ("CCN") for any territory in which MGE was already certificated. In paragraph 3 of the Agreement, SMNG agreed to the imposition of nine additional conditions "[i]f the Commission determines it is in the public interest for SMNG to be granted a certificate of public convenience and necessity for the construction of an intrastate pipeline and to own and operate a gas utility in Stone and Taney Counties." No one filed any objections to the Agreement within the seven days allowed by Commission Rule 4 CSR 240-2.115(2)(B).[5]

Conclusions of Law

[4] In Case No. GA-2006-0561, which involved almost exactly the same parties as this case, OEP filed an application for a certificate of convenience and necessity to serve portions of the same service area SMNG seeks to serve in this case. Of course, this report and order addresses only SMNG's application, not OEP's.

[5] Staff filed a "Response" to the Stipulation and Agreement on December 19, 2007. In this pleading, Staff expressed no opposition to the vast majority of the Agreement. However, Staff did object to paragraph 3.A., under which SMNG would be permitted "to provide service through farm taps for domestic purposes only when necessary to obtain right-of-way for the construction of the pipeline."

Section 393.170.3, RSMo 2000, authorizes the Commission to issue a certificate authorizing a gas corporation to construct a gas plant and serve as a public utility if the Commission determines, after due hearing, that such authority is "necessary or convenient for the public service." In construing the phrase "necessary or convenient," the Missouri Court of Appeals has stated that "[t]he term 'necessity' does not mean 'essential' or 'absolutely indispensable,' but that an additional service would be an improvement justifying its cost."[6] It is up to the Commission to determine, in the exercise of its discretion, "when the evidence indicates the public interest would be served in the award of the certificate."[7]

The Commission has previously recognized and applied five specific criteria that are to be considered when making that determination: (1) There is a public need for the proposed service; (2) The applicant is qualified to provide the proposed service; (3) The applicant has the financial ability to provide the proposed service; (4) The applicant's proposal is economically feasible; and (5) The proposed service promotes the public interest.[8] Section 393.170.3 further provides that the Commission "may by its order impose such condition or conditions as it may deem reasonable and necessary." Furthermore, since there were no timely filed objections to the nonunanimous Agreement filed by SMNG and MGE on December 4, 2007, the Commission "may treat [it] as a unanimous stipulation and agreement"[9] and it may be used "to resolve all or any part" of this contested case.[10]

After applying the findings of fact set forth below to the applicable law, the Commission concludes that authorizing SMNG to provide natural gas service to Branson, Branson West, and Hollister is necessary and convenient for the public service. Accordingly, the Commission will issue SMNG is a conditional CCN, subject to certain additional conditions specified in this report and order.

Findings of Fact

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[6] *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993) (citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. W.D. 1973)).

[7] *Id*. at 597-98 (citing *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. App. W.D. 1975)).

[8] *See*, *e.g.*, *In re Ozark Natural Gas Company*, 5 Mo.P.S.C. 3d 143, 146 (1996); *In re Tartan Energy Company*, 3 Mo.P.S.C. 3d 173, 177 (1994); *In re Intercon Gas, Inc.*, 30 Mo.P.S.C. (N.S.) 554, 561 (1991).

[9] Commission Rule 4 CSR 240-2.115(2)(C).

[10] Commission Rule 4 CSR 240-2.115(1)(B).

Is there a public need for the proposed service?

No regulated natural gas utility service is available in the proposed service area,[11] which, according to 2000 U.S. Census data, has a population of approximately 10,325 residents living in about 5,458 households.[12] Over 90% of these consumers currently use electric, propane, or a combination thereof to meet their energy needs.[13] SMNG's managing partner, Randal Maffett, testified that there was a clear public need for natural gas service in the area SMNG has proposed to serve, explaining that the company had "many discussions with city, county officials, local business leaders, [and the] general public, and we have heard nothing but, when can you get here, how fast can you get here and we wish you were here yesterday."[14]

Likewise, Branson's Mayor, Raeanne Presley, testified that although Branson was formed in the early 1900s, natural gas service had never been available but the community and the City Board of Aldermen remain hopeful that this commodity will eventually be brought to Branson.[15] She further testified that the city's corporate and private citizens alike were "very anxious" to be given a chance to see what growth opportunities there might be with the availability of natural gas, and that it was important to the entire community to have more choices when it comes to energy.[16]

Moreover, the fact that SMNG has already been awarded municipal franchises to provide natural gas service to the residents of Branson and Hollister (and is seeking such a franchise to serve the much smaller community of Branson West, which has expressed a strong interest in awarding SMNG a municipal franchise)[17] is additional evidence of public need. Finally, witnesses presented by both Staff and OEP also agreed with SMNG that there is a definite public need for natural gas service in

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[11] Tr. 70:2-4; Tr. 73-74:25-1.

[12] Tr. 69-70:16-1.

[13] Exhibit 17 (HC); Tr. 405:11-20. Mr. Maffett testified that a market study originally performed by AGE showed that approximately 40% of the residential mix in the Branson area proper is all-electric, while 50% is a mix of electric and propane, 2% is propane-only, and 8% is other fuels, such as wood, coal, and the like. Tr. 101:7-13.

[14] Tr. 71:7-14. Mr. Maffett later testified that "based on the feedback from the local businesses, from local county and city officials and the general population," the "people of the Branson, Hollister and Branson West areas are very excited about [the prospect of] having natural gas." Tr. 83:12-17.

[15] Tr. 138:17-23.

[16] Tr. 137:1-10; Tr. 136:13-21.

[17] Tr. 69:2-15; Tr. 97-98:24-14.

the proposed service area.[18] Indeed, as explained in the *Tartan Energy* case, "The Commission also notes that as a general policy in recent years, it has looked favorably upon applications designed to spread the availability of natural gas throughout the State of Missouri wherever feasible."[19]

The Commission finds that there is a public need for the service proposed by SMNG in Branson, Hollister, Branson West, and the surrounding unincorporated areas.

Is SMNG qualified to provide the proposed service?

What is now SMNG (which was previously known as Tartan Energy Company, L.C. d/b/a Southern Missouri Gas Company) has been in operation as a regulated gas corporation and public utility under the jurisdiction of the Missouri Public Service Commission since its inception in 1994, when it was first certificated as a local gas distribution company for residential, commercial, and industrial customers in twelve southern Missouri communities.[20] Furthermore, less than six months ago, the Commission granted SMNG a conditional CCN to serve Lebanon, Houston, and Licking, Missouri, finding that the company was qualified to provide natural gas service to those communities.[21]

Mr. Maffett testified that SMNG has been in successful operation for over 12 years, currently has approximately 35 employees with a collective industry experience of over 200 to 300 years, and is qualified to develop and operate the proposed natural gas project.[22] Upon approval of its application, SMNG intends to add approximately 20 full-time employees to ensure that it continues to provide safe and adequate service to the new communities, the majority of whom will be involved with construction, conversion, service technicians, meter readers, sales and marketing, and back office functions.[23]

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[18] Tr. 257:6-10; Tr. 373:6-12.

[19] *Tartan Energy*, 3 Mo.P.S.C. 3d at 182.

[20] Report and Order, *Tartan Energy*, 3 Mo.P.S.C. 3d 173 (1994); Tr. 258:5-9; Order Granting Certificate of Convenience And Necessity, *In re Tartan Energy Company*, 4 Mo.P.S.C. 3d 61 (1995). In particular, the Commission stated: "The Commission is confident that Tartan [now known as SMNG] possesses the necessary knowledge of the natural gas utility industry including the industry as it has developed in the State of Missouri, as well as of all the requisite technical requirements regarding engineering, safety, and so forth, and so finds. Thus, Tartan has shown that it is qualified to provide the proposed service." 3 Mo.P.S.C. 3d at 183.

[21] *See* Report and Order, *In re Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas*, Case No. GA-2007-0212 (Aug. 16, 2007).

[22] Tr. 72:16-25.

[23] Tr. 75:12-19; Tr. 73:7-10.

Upon Commission approval, Michael Lewis will be the professional engineer in charge of SMNG's construction efforts throughout the proposed service area. Mr. Lewis, a registered professional engineer who performed the preliminary design route selection and associated calculations necessary to ensure that SMNG would construct the right size line at an appropriate cost,[24] has an extensive background in the natural gas pipeline industry dating back to 1976. He has worked for United Gas Pipeline Company for ten years, Gulf States Gas and Gulf States Pipeline for eight years, served as a private consultant, and worked for a multinational engineering procurement and construction contracting company known as the Fluor Corporation, where he headed the pipeline department.[25] In these various capacities, Mr. Lewis has been involved in the construction of in excess of 20,000 kilometers of pipelines in seven states and ten countries on a total of six continents,[26] including projects involving types of rock that are harder than the sandstone and limestone present in the portions of the proposed project area.[27]

Meanwhile, no evidence was adduced at the hearing seriously challenging the qualifications of SMNG to provide the proposed service. The Commission finds that SMNG has the necessary engineering expertise and experience to satisfy the criterion of being qualified to provide the proposed service in Branson, Hollister, Branson West, and the surrounding unincorporated areas.

Does SMNG have the financial ability to provide the proposed service?

Mr. Maffett testified that the estimated total cost of the proposed project is approximately $24 million,[28] consisting of approximately $18 million to build a 35-mile-long supply pipeline from Aurora to the Branson area, and about $6 to $6.5 million to develop and build out the associated distribution system.[29] He further stated that at this point, all of the project design and preliminary engineering work is complete and that SMNG was "basically waiting on the regulatory process and closing the financing" to proceed with the project.[30] In concluding that SMNG has

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[24] Tr. 222:17-18 (HC); Tr. 223-24:24-7 (HC).
[25] Tr. 222:7-25 (HC).
[26] Tr. 223:1-25 (HC).
[27] Tr. 225:20-25 (HC); Tr. 226:1-25 (HC); Tr. 229-30:23-2; Tr. 230-31:18-3. As to the rock involved with the proposed project, Mr. Lewis opined: "It's difficult but it's doable." Tr. 225:25 (HC).
[28] Tr. 74:4-6.
[29] Tr. 68:13-22.
[30] Tr. 74:7-13.

the necessary financial strength to provide the proposed service, Mr. Maffett referred to the company's pending financing application in Case No. GF-2007-0215,[31] a consolidated proceeding in which SMNG seeks the Commission's authorization to recapitalize the company by bringing in a new infusion of equity capital in the range of $10-13 million and approximately $40-50 million in debt capital[32] in order to provide the necessary funds to complete not only the proposed Branson, Hollister, and Branson West project, but also the company's expansion into Lebanon, Houston, and Licking.[33]

In light of these facts, and because Case No. GF-2007-0215 still remains pending, the Commission declines SMNG's invitation to make a finding that the company is financially capable of providing the proposed natural gas service in Branson, Hollister, Branson West, and the surrounding unincorporated areas. Instead, the Commission will, as requested by Staff in its brief and recommended by its witness Michael Straub during the hearing,[34] issue SMNG a conditional CCN and defer making any finding regarding this criterion until after the Commission decides Case No. GF-2007-0215.

<u>Is SMNG's proposal economically feasible?</u>

The Commission believes that the Feasibility Study prepared by SMNG,[35] which was the subject of extensive and vigorous criticism by OEP's witness Steven Cattron and equally extensive and vigorous rebuttal testimony from Mr. Maffett, is a useful tool in helping determine whether SMNG's proposal is economically feasible. However, the Commission also agrees with Staff that SMNG's ability to secure acceptable financing is also a useful tool in making that determination, since it would indicate that a sophisticated lender had found that the company's proposal met some objective criteria for economic feasibility. Because Case No. GF-2007-0215 still remains pending, the Commission also declines SMNG's invitation to make a finding that its proposal to provide natural gas service in Branson, Hollister, Branson West, and the surrounding unincorporated areas is economically feasible. Instead, the Commission will, as requested by Staff in its brief and recommended by

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[31] Tr. 73:1-6.
[32] Tr. 80-81:20-1.
[33] Tr. 81:2-4; Tr. 81:20-25. See also the Second Amended Financing Application filed by SMNG in Case No. GF-2007-0215 on December 17, 2007.
[34] Tr. 243-46 *passim*.
[35] Appendix C to Exhibit 2 (HC).

its witness Michael Straub during the hearing,[36] issue SMNG a conditional CCN and defer making any finding regarding this criterion until after the Commission decides Case No. GF-2007-0215.

Does the service proposed by SMNG promote the public interest?

Mayor Presley testified that there would be numerous public benefits if the Commission granted SMNG's application. According to Mayor Presley, Commission approval of the application would assist existing large energy users, such as hospitals, local school districts, and the city's convention center by providing them an alternative energy source.[37] Ms. Presley also testified that the lack of natural gas availability in Branson is viewed as a "negative" factor by prospective employers considering locating in Branson.[38] Mayor Presley summarized the need for natural gas as follows:

> Well, I also wanted to mention that we are in the process of developing a 300-acre commerce park. It's what we would call a smart park. It sits across from a very large underground that's quite phenomenal for our region. A lot of big name companies are moving in there. Jack Henry has recently moved a lot of their processing and software development in there, and we believe that has real potential to diversify our economy.
>
> As you know, we are tourism-based. That is all that we do in Branson. But it does have limits in terms of year-round employment and wages. And we're looking for folks to move into our community that would be involved in different types of industries that would have a higher wage. We are in desperate need of workforce in our community, and we hope that natural gas will be one piece of that puzzle.[39]

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36 Tr. 243-46 *passim*. As Mr. Straub explained: "[A]lthough the feasibility study is an extremely important part of the application, the feasibility study has not been the mechanism that's prevented other applicants from achieving a successful operation in Branson or even getting gas into the Branson area. It's been the financing problem or the lack of the money in order to develop those systems down there. So in Staff's view, the most important issue in these two applications [of SMNG and OEP] is their ability to get the financing that would enable them to build the systems." Tr. 245-46:21-7.

37 Tr. 136-37:22-10.

38 Tr. 137:19-25.

39 Tr. 139:3-20.

Likewise, Mr. Maffett testified that natural gas is one of the preferred forms of energy across the United States, and that SMNG could deliver it to the proposed service area at a cost which would be "quite competitive with the current cost for what customers pay vis-à-vis [the] alternative energy sources" currently in use there,[40] thereby giving consumers more energy choices at a lower cost,[41] particularly in comparison to propane, where he projected cost savings of 25-30%.[42] Mr. Maffett also indicated that the proposed service would provide additional jobs and stimulate future long-term economic development in the Branson area in particular and southern Missouri in general.[43]

The Commission finds that the service proposed by SMNG would promote the public interest.

Should the Commission impose additional conditions on the CCN issued to SMNG?

As discussed in the Commission's conclusions of law *supra*, since there were no timely filed objections to the nonunanimous Stipulation and Agreement filed by SMNG and MGE on December 4, 2007, the Commission may treat it as a unanimous stipulation and agreement and use it to resolve all or any part of this contested case. After reviewing the Agreement, the Commission finds it to be reasonable and necessary and shall adopt, as part of this report and order, the conditions set out in paragraphs 2 and 3 therein. And, since SMNG has yet to obtain a municipal franchise to serve Branson West, the CCN to serve Branson, Hollister, and Branson West cannot become "final" until SMNG is granted the missing franchise.

SMNG has requested that the Commission grant it a conditional CCN in this proceeding with the same conditions imposed in Case No. GA-2007-0212, including the condition that the company obtain financing that is acceptable to and approved by the Commission. In its brief, Staff also argues that the Commission should grant SMNG a conditional CCN. However, Staff suggests that SMNG should also be required to submit to an additional condition that was *not* imposed on SMNG less than six months ago in Case No. GA-2007-0212. This additional condition is:

> SMNG agrees that if, at any time, it sells or otherwise disposes of its assets before SMNG has cost based

[40] Tr. 73-74:23-3.
[41] Tr. 68:1-8; Tr. 73:11-15.
[42] Tr. 71-72:15-6.
[43] Tr. 68:9-12; Tr. 68-69:23-1; Tr. 73:15-19; Tr. 75:3-6.

> rates in a sale, merger, consolidation or liquidation transaction at a fair value less than its net original cost for those assets, the purchaser/new owner shall be expected to reflect those assets on its books at its purchase price or the fair value of the assets, rather than at the net original cost of the assets. This provision is intended to define SMNG's responsibility relative to the exercise of this certificate relative to SMNG's risk, not SMNG's customers, to absorb the costs in the event serving of this area is found to be uneconomic under original cost of service regulation. SMNG also acknowledges that it is the intention of the Parties that the provisions of this paragraph shall apply to any successors or assigns of SMNG**.** Nothing in this paragraph is intended to increase or diminish the existing rights or obligations of the parties with respect to ratemaking treatment of SMNG's existing assets outside the properties related to this certificate.[44]

SMNG is opposed to this condition because it would have the unreasonable effect of making SMNG attempt to bind any hypothetical future purchaser of the company's assets before cost-based rates are in place to a "front end" agreement to use a specific accounting adjustment. SMNG argues that because Staff's proposed accounting adjustment would cause an immediate write-down on the purchaser's rate base if the future buyer purchased the property at less than book value, it would be more appropriate for the Commission to review such accounting issues on the "back end" – that is, if and when the identity of the hypothetical future purchaser, the purchase price, existing rate base, and other relevant circumstances were actually known.

SMNG also argues that this provision is unnecessary since it has already agreed to abide by all conditions imposed in Case No. GA-2007-0212, including the one which required SMNG's shareholders to assume the financial risk associated with the expansion of SMNG's service area to include Lebanon, Houston, and Licking. SMNG further contends it is also a totally unprecedented condition which flies in the face of a long standing practice of the Commission that both positive and negative acquisition

[44] In Case No. GA-2006-0561, OEP agreed to a similar condition via a nonunanimous stipulation and agreement with Staff, which was filed on November 8, 2007. In this case, however, SMNG opposes such a provision as a prerequisite to being granted a CCN.

adjustments will not be reflected in rates, and that it has never been previously proposed by Staff (except in Case No. GA-2006-0561, which is OEP's application) or accepted by the Commission in any previous case, including the previous certificate cases of SMNG.

For their part, Staff, OPC, and OEP all strongly insist in their briefs that the condition is necessary to promote the public interest should SMNG's proposed gas service system fail to achieve forecasted conversion rates or otherwise turn out to be unable to successfully compete against propane.

At the outset, the Commission notes that this is a policy issue whose outcome is not dictated by statute or Commission Rule. As such, it falls squarely within Section 393.170.3, which provides that the Commission "may by its order impose such condition or conditions as it may deem reasonable and necessary." For the following reasons, the Commission finds that Staff's proposed condition is neither reasonable nor necessary.

Notwithstanding the various protestations to the contrary, the proposed condition is indeed unprecedented, as it has never been previously suggested by Staff in a litigated certificate case other than Case No. GA-2006-0561.[45] For example, Staff did not propose it in SMNG's recent (and successful) application for a certificate of public convenience and necessity to serve Lebanon, Houston and Licking in Case No. GA-2007-0212.[46] Nor did Staff propose it in SMNG's original certificate case to build its existing local distribution system in 1994.[47] Similarly, Staff did not attempt to impose it in Case No. GA-2007-0078, in which Missouri Gas Utility recently sought an expansion of its certificate.[48] In fact, Staff witness Mark Oligschlaeger candidly testified that Staff has never even attempted to propose this condition in any other case, with the exception of the pending certificate case involving OEP.[49]

The proposed Staff condition is also unnecessary since SMNG has already indicated that its shareholders will take the economic risk associated with the expansion of its service area to Branson, Hollister, and Branson West, just as they did in the Lebanon case.[50] The Commission does not see why it is necessary to protect ratepayers to impose a "front end" condition that has a significant potential to adversely and unfairly affect SMNG's ability to dispose of its assets in the future, when

[45] Tr. 280:4-24.
[46] Tr. 279:12-15.
[47] Tr. 280:9-20.
[48] Tr. 280:21-25.
[49] Tr. 279-80:16-8.
[50] Tr. 87-88 *passim*.

an acceptable "back end" remedy is already available should there be any abuses.

The Commission also observes that there are strong precedents against allowing acquisition premiums to be reflected in rates when the assets are purchased at more than book value. For example, the Commission has stated that it will not require a company to write down its rate base when the assets are sold at less than book value.[51] In addition, Mr. Oligschlaeger testified that the Uniform System of Accounts requires that the use of "net original cost" for ratemaking, and that it would require a waiver if a public utility requested the accounting treatment now being advocated by Staff.[52] And although Mr. Oligschlaeger also testified that this practice has been the consistent policy for public utilities under cost-based rates,[53] he admitted that neither Staff nor the Commission has ever previously attempted to impose this condition upon an unwilling company as a prerequisite of obtaining a CCN.[54] For all of these these reasons, the Commission declines to impose the condition discussed here and proposed by Staff in this case.

The final issue is whether the Commission should impose a number of other conditions similar to those recommended in the Stipulation and Agreement between OEP and Staff in Case No. GA-2006-0561, which was filed on November 8, 2007. Mr. Maffett testified that with the exception of the condition discussed immediately above, SMNG has "no objections to any of the other terms and conditions in the stipulation," because the company was already in voluntary compliance with most of them anyway throughout the course of the company's day to day operations over the past 12 years.[55] In short, Mr. Maffett explained that in his view, the conditions in question are unnecessary since SMNG is currently following them. The Commission finds that even though SMNG may already be complying with these routine conditions as a part of its obligations as an existing public utility, it will do no harm to require the company to do what it is already doing.

IT IS ORDERED THAT:

1. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas is granted a conditional certificate of convenience

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[51] *See*, *e.g.*, *In re UtiliCorp United Inc. and St. Joseph Light & Power Co.*, 12 Mo.P.S.C.3d 388, 389-90 (2004).
[52] Tr. 275:1-25; Tr. 284-85 *passim*.
[53] Tr. 280-81:25-4.
[54] Tr. 281-82 *passim*.
[55] Tr. 78:13-24.

and necessity to provide natural gas service to Branson, Branson West, Hollister, and the surrounding unincorporated areas, conditioned upon the company's submission of financing arrangements the Commission finds acceptable and its acceptance of non-disposition accounting-related conditions similar to those recommended in the Stipulation and Agreement between Ozark Energy Partners, LLC and Staff in Case No. GA-2006-0561.

2. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall not begin construction of any facility in Missouri for the purpose of offering natural gas service to Branson, Branson West, Hollister, or the surrounding unincorporated areas until it has obtained approval of its financing and a "full" certificate of public convenience and necessity from the Missouri Public Service Commission.

3. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall comply with the terms and conditions set out in paragraphs 2 and 3 of the Stipulation and Agreement entered into between it and Missouri Gas Energy.

4. This order shall become effective on February 15, 2008.

Davis, Chm., Murray, Appling and
Jarret CC., concur;
Clayton, C., dissents;
and certify compliance with the provisions
of Section 536.080, RSMo.

NOTE: Another order in this case can be found at page 324.

In the Matter of Union Electric Company d/b/a AmerenUE's Tariff Establishing an Industrial Demand Response Program

Case No. ET-2007-0459
Decided February 14, 2008

Electric §1. The Commission approved the stipulation filed on January 25, 2008 as a resolution of all issues in this case. Furthermore, the tariff issued on January 25, 2008, by Union Electric Company, d/b/a AmerenUE, and assigned Tariff No. YE-2008-0444, was approved with an effective date of February 24, 2008.

ORDER APPROVING STIPULATION AND AGREEMENT AND APPROVING TARIFF

In its Report and Order in Union Electric Company d/b/a AmerenUE's most recent rate case, ER-2007-0002, the Commission ordered AmerenUE to file a revised Industrial Demand Response tariff. AmerenUE initially filed such a tariff on July 2, 2007, with a 90-day effective date of October 1. Some parties were not satisfied with that tariff, so on September 25, the Commission suspended that initial tariff for 30 days to allow the parties more time to negotiate. On October 23, AmerenUE withdrew its initial tariff and replaced it with a new tariff bearing a November 22 effective date. On November 16, the Commission suspended the second tariff until March 21, 2008. Subsequently, the Commission established a procedural schedule leading to a hearing set for February 26 and 27.

On January 25, AmerenUE withdrew its second tariff and replaced it with a third tariff that carries an effective date of February 24. This time, the newly revised tariff was accompanied by a stipulation and agreement indicting that the signatory parties do not oppose this version of the tariff. The stipulation and agreement was signed by AmerenUE, Staff, the Missouri Energy Group, and the Office of the Public Counsel. Two parties, the Missouri Industrial Energy Consumers (MIEC) and Noranda Aluminum did not sign the stipulation and agreement. However, the stipulation and agreement represents that those parties do not oppose the agreement and do not request a hearing. In addition, Commission Rule 4 CSR 240-2.115(2) provides that if no party objects to a nonunanimous stipulation and agreement within seven days of its filing, the Commission may treat that stipulation and agreement as unanimous. No party has filed a timely objection to the stipulation and agreement and the Commission will treat it as unanimous.

In response to the filing of the stipulation and agreement, the Commission cancelled the remaining procedural schedule, including the hearing, and directed its Staff to file a memorandum regarding the stipulation and agreement. Staff filed its memorandum supporting the stipulation and agreement on February 5.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[1] Furthermore, Section 536.090, RSMo Supp. 2007, provides that when accepting a stipulation and agreement, the Commission does not need to make either findings of fact or conclusions of law. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.[2] Since no one has requested a hearing, the Commission may approve the submitted tariff based on the stipulation and agreement.

Based on the stipulation and agreement and Staff's memorandum in support, the Commission believes the parties have reached a just and reasonable settlement in this case. Consequently, the Commission will approve the submitted tariff.

IT IS ORDERED THAT:

1. The stipulation and agreement filed on January 25, 2008, is approved as a resolution of all issues in this case (See Attachment 1).

2. All signatory parties are ordered to comply with the terms of the stipulation and agreement.

3. The tariff issued on January 25, 2008, by Union Electric Company, d/b/a AmerenUE, and assigned Tariff No. YE-2008-0444, is approved to be effective on February 24, 2008. The tariff sheets approved are:

PSC Mo. – Schedule No 5
Original Sheet No. 219
Original Sheet No. 220
Original Sheet No. 221
Original Sheet No. 222
Original Sheet No. 223
Original Sheet No. 224

[1] Section 536.060, RSMo Supp. 2007.

[2] *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission,* 776 S.W.2d 494, 496 (Mo. App. 1989).

4. This order shall become effective on February 24, 2008.
5. This case shall be closed on February 25, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P for Authority to Implement Rate Adjustments Required By 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism*

Case No. EO-2008-0216
Decided February 14, 2008

Electric §14. The Commission interpreted its regulation authorizing the use of a Fuel Adjustment Clause (FAC) to mean that the beginning of the True-Up Year is the first day of the first month following the effective date of the Report and Order detailing the FAC and not the effective date of the subsequent order approving a tariff complying with the Report and Order.

Electric §20. The Commission interpreted its regulation authorizing the use of a Fuel Adjustment Clause (FAC) to mean that the beginning of the True-Up Year is the first day of the first month following the effective date of the Report and Order detailing the FAC and not the effective date of the subsequent order approving a tariff complying with the Report and Order.

Rates §101. The Commission interpreted its regulation authorizing the use of a Fuel Adjustment Clause (FAC) to mean that the beginning of the True-Up Year is the first day of the first month following the effective date of the Report and Order detailing the FAC and not the effective date of the subsequent order approving a tariff complying with the Report and Order.

ORDER APPROVING TARIFF TO ESTABLISH RATE SCHEDULES FOR FUEL ADJUSTMENT CLAUSE

On December 28, 2007, Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P, submitted a tariff designed to establish rate

*The case was appealed to the Missouri Court of Appeals (WD) and reversed and remanded. See 311 SW 3d 361 (Mo App. W.D. 2010).

schedules related to Aquila's approved Fuel Adjustment Clause (FAC). That tariff carries an effective date of March 1, 2008. The Commission's rule regarding FACs requires the Commission to either approve or reject the company's tariff within 60 days of its filing.[1] To that end, the rule requires the Commission's Staff to submit a recommendation within 30 days regarding its examination and analysis of whether the proposed FAC tariff complies with applicable statues, regulations, and the company's approved FAC mechanism.[2] On January 29, Staff filed its recommendation advising the Commission to approve Aquila's tariff.

On February 8, the Office of the Public Counsel, AG Processing, Inc., and Sedalia Industrial Energy Users' Association jointly filed a motion urging the Commission to reject Aquila's proposed tariff. The Commission ordered that any party wishing to respond to the motion to reject Aquila's tariff do so no later than February 13**.** Aquila and Staff filed responses on February 13.

The motion asking the Commission to reject Aquila's tariff is based entirely on an interpretation of a section of the Commission's rule that implements the statutory provision that permits consideration of an FAC. The Commission Rule regarding FAC mechanisms defines a True-Up Year as "the twelve (12) month period beginning on the first day of the first calendar month following the effective date of the commission order approving a RAM …."[3] Aquila's tariff uses an initial fuel and purchased power cost accumulation period of six months, beginning on June 1, 2007, and running through November 30, 2007.

Aquila's use of a June 1 beginning date for accumulating costs assumes the controlling Commission order approving the company's FAC is the Report and Order that resolved Aquila's rate case and defined the parameters of the FAC that the Commission would allow Aquila to include in its tariffs.[4] That Report and Order became effective on May 27, 2007, so the first day of the first calendar month following would be June 1, 2007.

The parties that urge the Commission to reject Aquila's tariff contend the Commission order establishing the date for beginning the

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[1] 4 CSR 240-20.090(4).

[2] Id.

[3] 4 CSR 240-20.090(1)(I). A RAM, or rate adjustment mechanism, as used in the rule, refers to either a FAC or an interim energy charge. The Commission's rule detailing the filing and submission requirements for a utility's submission of an FAC, 4 CSR 240-3.161(1)(G), includes the same definition of True-Up Year.

[4] *Report and Order*, Case No. ER-2007-0004, issued May 17, 2007.

accumulation of costs is not the Report and Order, but rather the order approving Aquila's tariff describing the details of its FAC.[5] That order became effective on July 5, 2007, so the first day of the first calendar month following would be August 1, 2007. On that basis, the moving parties contend Aquila's tariff improperly attempts to recover costs incurred in June and July 2007, and should be rejected.

There is no factual dispute between the parties about Aquila's tariff. Essentially, the Commission's decision whether to approve or reject that tariff must turn on an interpretation of the meaning of the Commission's regulation. As previously indicated, the key regulatory provision is the definition of True-Up Year which states that the true-up year, meaning the period for which the company can accumulate costs, begins on the first day of the first month following the effective date of the commission order that approves the FAC. If Aquila and Staff are correct, Aquila will be able to recover costs accumulated in June and July 2007. If the parties that oppose the tariffs are correct, the accumulation and recovery of costs cannot begin until August 1.

This is the first interim rate adjustment to a FAC under these regulations so the Commission has no prior decisions to guide it. However, in considering the meaning of its regulation, the Commission must follow the guiding principles expressed in the statute that authorizes the use of an FAC. Section 386.266.4 states that the Commission may approve an FAC if it finds that "the adjustment mechanism set forth in the schedules: (1) Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." Following that principle, the Commission must attempt to reach a resolution that is fair to both the utility and its ratepayers.

In its Report and Order, the Commission set out in detail the parameters of the FAC that Aquila would be allowed to implement. In that Report and Order, the Commission made difficult factual, legal, and policy decisions about the nature of an appropriate FAC. The subsequent submission and approval of tariffs consistent with that Report and Order is more or less a ministerial act of less significance. Therefore, it makes more sense to interpret the regulation to tie the beginning date of the cost accumulation period to the issuance of the Report and Order than to the issuance of the subsequent order approving a tariff in compliance with the Report and Order.

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[5] *Order Granting Expedited Treatment and Approving Tariff Sheets*, Case No. ER-2007-0004, issued June 29, 2007.

This interpretation of the definition in the regulation also allows Aquila to recover costs for two months that it would otherwise not be able to recover. That recovery is consistent with the decisions reached by the Commission in its Report and Order that allowed for the recovery of those costs to give Aquila a "sufficient opportunity to earn a fair return on equity." This interpretation is also consistent with Aquila's approved tariff, which sets a recovery period beginning on June 1.

The Commission interprets its regulation as establishing a recovery period beginning on the first day of the first month following the Report and Order, and not following the approval of the implementing tariff. The motion to suspend will be denied and the tariff will be approved.

IT IS ORDERED THAT:

1. The Motion to Reject Tariffs filed by the Office of the Public Counsel, AG Processing, Inc. and Sedalia Energy Users' Association is denied.

2. The tariff issued on December 28, 2007, by Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P, and assigned Tariff No. YE-2008-0402, is approved to be effective March 1, 2008. The tariff approved is:

P.S.C. MO No 1

1st Revised Sheet No. 127, Canceling Original Sheet No. 127

3. This order shall become effective on March 1, 2008.

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur.
Clayton, C., dissents.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: Another order in this case can be found at page 170.

In the Matter of CenturyTel of Missouri, LLC's Request for Competitive Classification Pursuant to Section 392.245.5, RSMo.

Case No. IO-2008-0243
Decided February 14, 2008

Telecommunications §40. The Commission granted CenturyTel of Missouri, LLC's request for competitive classification pursuant to Section 392.245.5 RSMo, for residential services, other than exchange access service, for the Branson, Exeter, and Rockaway Beach exchanges. The Commission also granted competitive classification for business services, other than exchange access service, in the Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges.

ORDER GRANTING COMPETITIVE CLASSIFICATION AND APPROVING TARIFF SHEETS

Syllabus: In this Order, the Missouri Public Service Commission grants CenturyTel of Missouri, LLC's request, pursuant to Section 392.245.5, RSMo Cum. Supp. 2007, for competitive classification of the residential services, other than exchange access service, in its Branson, Exeter, and Rockaway Beach exchanges and the business services, other than exchange access service in its Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges. In addition, the Commission approves the tariff sheets filed to implement the competitive classifications.

Procedural History

On January 25, 2008, CenturyTel of Missouri, LLC filed its verified Application for Competitive Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2007. In its application, CenturyTel requested that the Commission classify the residential services it offers in its Branson, Exeter, Rockaway Beach, and Wright City exchanges, other than exchange access services, as competitive. CenturyTel also requested that the Commission classify the business services CenturyTel offers in its Cabool, Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges, other than exchange access services, as competitive.

Concurrent with the filing of its application, CenturyTel filed proposed tariff sheets which reflected the requested competitive classifications and had an effective date of February 24, 2008. Although CenturyTel stated in its application that no price changes were being

made in its tariffs,[1] those tariffs contained price decreases for all the subject exchanges except Rockaway Beach. The Rockaway Beach exchange contained a price increase.[2]

On January 31, 2008, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date, in which the Commission provided notice of CenturyTel's application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media, that any party wishing to intervene in the proceeding must file an application no later than February 8, 2008. This order also established a full procedural schedule and reserved a date for an evidentiary hearing on CenturyTel's application. There were no requests for intervention.

On February 8, 2008, CenturyTel amended its application by withdrawing its request for competitive classification of the residential services in the Wright City exchange and the business services in its Cabool exchange. On the same day, Public Counsel filed a pleading asking the Commission to require strict compliance with the statutory requirements relating to the remainder of CenturyTel's application. Public Counsel's pleading further indicated that although Public Counsel would not stipulate that those exchanges exhibit sufficient competition to justify competitive classification, it was *not* requesting an evidentiary hearing and had no objection to the Commission deciding the case on the basis of the existing record before it.

Also on February 8, 2008, the Staff of the Missouri Public Service Commission filed a verified pleading recommending that the Commission approve CenturyTel's amended application with regard to the requests for competitive classification. Staff also recommended that the Commission "order CenturyTel to file amended tariff sheets removing all rate increases and removing competitive classification for residential services in the Wright City exchange and for business services in the Cabool exchange."[3]

On February 13, 2008, CenturyTel filed substitute sheets to remove the rate changes and the exchanges that were withdrawn from its request for competitive classification. Staff filed a Supplemental Recommendation on February 14, 2008, recommending approval of the tariff sheets as substituted.

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[1] Application, para. 7.
[2] Staff Recommendation, Appendix A, p. 4.
[3] Staff Recommendation, p. 2.

Overview

CenturyTel is an incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within that exchange.[4] The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.[5] The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."[6] Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

CenturyTel's amended application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for each exchange and type of service requested.

Findings of Fact

The Commission, having reviewed CenturyTel's pending tariff, the verified application and supporting documentation, and Staff's verified recommendation, memorandum and supporting documentation, which are admitted into evidence, makes the following findings of fact.

CenturyTel is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications

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4 Section 392.245.5(6), RSMo Cum. Supp. 2007.
5 Section 392.245.5(1), RSMo Cum. Supp. 2007.
6 Section 392.245.5(2), RSMo Cum. Supp. 2007.

service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.[7] CenturyTel is a large ILEC subject to price cap regulation.[8]

In its amended application, CenturyTel requested that the Commission classify as competitive its residential services, other than exchange access service, in the Branson, Exeter, and Rockaway Beach exchanges. CenturyTel also requested that its business services, other than exchange access service, be classified as competitive in its Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges. In support of this request, CenturyTel filed its verified application listing the facilities-based and wireless carriers competing in each exchange. CenturyTel specifically stated:

> CenturyTel has numerous non-affiliated wireless providers operating in its exchanges providing local service. Exhibits B through J identify wireless carriers, including (a) AT&T Wireless, (f/k/a Cingular), (b) Verizon, (c) T-Mobile, (d) Alltel, (e) US Cellular, and (f) Sprint/Nextel providing local service in the [relevant] . . . CenturyTel exchanges.
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> * * *
>
> Specific to this application, MCC Telephony of Missouri, Inc. is providing residential phone service, using facilities it owns in part or whole, in the CenturyTel exchange of Exeter. Cebridge Communications, LLC d/b/a Suddenlink Communications[9] is providing residential service, using facilities it owns in part or whole, in the CenturyTel exchanges of: (a) Branson and (b) Rockaway Beach. Charter Fiberlink-Missouri, LLC is providing business phone service, using facilities it owns in part or whole, in the CenturyTel exchange of Dardenne. Socket Telecom, LLC is providing business phone service, using facilities it owns in part or whole in the CenturyTel exchanges of: (a) Cabool, (b) Dardenne, (c) Hallsville, (d) Warrenton, (e) Winfield, and (f) Wright City; and is providing residential phone service, using facilities it owns in part or whole in the CenturyTel exchange of Wright City.

Staff also provided its verified recommendation, supporting memorandum, supplemental recommendation, and affidavits in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. According to Staff's

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[7] CenturyTel of Missouri, LLC's Application for Competitive Classification, para. 1.
[8] *Id*.
[9] Footnote omitted.

recommendation, there is at least one facilities-based wireline carrier and at least one wireless carrier serving each exchange at issue. In addition, those providers are not affiliated with CenturyTel and provide basic local phone service to at least two customers of the appropriate classification within those exchanges. Further, Staff states that the competing carriers have residential and/or business customers with numbers which are considered to be "local" numbers in those exchanges.[10]

Staff states that it has no objection to and recommends (1) competitive classification for CenturyTel's residential services, other than exchange access service, in the Branson, Exeter, and Rockaway Beach exchanges, and (2) competitive classification for CenturyTel's business services, other than exchange access service, in the Dardenne, Hallsville, Warrenton, Winfield and Wright City exchanges.

In its review of CenturyTel's tariff sheets, Staff determined that even though the Company stated in its application that prices were not changing, the prices on the proposed tariff sheets had decreased in every exchange with the exception of Rockaway Beach, which increased. Accordingly, Staff originally recommended that the Commission direct CenturyTel to amend its tariff sheets by removing all rate increases and by removing the competitive classification for the exchanges which it has withdrawn from its application.

CenturyTel substituted its tariffs on February 13, 2008. The substitute tariff sheets removed all the rate changes and are designed to only add the competitive classifications requested in the amended application. Staff, in its supplemental recommendation, recommended that the Commission approve the substituted tariff sheets.

The Commission finds that the facts as submitted in the verified application, as amended, verified Staff recommendation and supporting memorandum, supplemental recommendation, and the related attached materials are reliable and support the grant of competitive classification in the requested exchanges.

The Commission finds that in the Exeter exchange, facilities-based local voice service is being provided to at least two residential customers by Mediacom. In addition, the Commission finds that there is at least one non-affiliated wireless services carrier, AT&T Mobility, providing service to residential[11] customers in the Exeter exchange.

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[10] Staff Recommendation, page 6, and Appendix A.

[11] AT&T Mobility categorized the customers as "non-business."

In the Rockaway Beach exchange, the Commission finds that facilities-based local voice service is being provided to at least two residential customers by Suddenlink.[12] In addition, the Commission finds that there are at least two non-affiliated wireless services carriers, AT&T Mobility and Sprint PCS/Nextel, providing service to residential[13] customers in the Exeter exchange.

The Commission finds that in the Branson exchange, facilities-based local voice service is being provided to at least two residential customers by Suddenlink. In addition, the Commission finds that there are at least three non-affiliated wireless services carriers, US Cellular, AT&T Mobility, and Sprint PCS/Nextel, providing service to residential customers in the Branson exchange.

The Commission finds that in the Dardenne exchange, four facilities-based carriers, AT&T Communications of the Southwest, Socket Telecom, Nuvox Communications of Missouri, and Charter Fiberlink, were providing local voice service to at least two business customers. In addition, the Commission finds that there are at least two non-affiliated wireless services carriers, AT&T Mobility and Sprint/Nextel, providing service to business customers in the Dardenne exchange.

The Commission finds that in the Hallsville and Winfield exchanges, facilities-based local voice service is being provided to at least two business customers by Socket Telecom. In addition, the Commission finds that there are at least two non-affiliated wireless services carriers, AT&T Mobility and US Cellular, providing service to business customers in the Hallsville and Winfield exchanges.

The Commission finds that in the Warrenton and Wright City exchanges, facilities-based local voice service is being provided to at least two business customers by Socket Telecom. In addition, the Commission finds that there are at least two non-affiliated wireless services carriers, AT&T Mobility and Sprint/Nextel, providing service to business customers in the Warrenton and Wright City exchanges.

The Commission also finds that each of the competing carriers has local numbers available for use by customers in each of the exchanges at issue.

Finally, the Commission has determined that the tariff sheets as substituted are designed to implement the competitive classification in

[12] Suddenlink is a cable television provider offering local voice service using its own or one of its affiliates' facilities.
[13] AT&T Mobility categorized the customers as "non-business."

accordance with this order. Therefore, the Commission shall approve the tariff sheets as submitted.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), which provides as follows:

> Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

CenturyTel is an incumbent local exchange telecommunications company and has requested competitive classification of its residential services, other than exchange access service, in its Branson, Exeter, and Rockaway Beach exchanges. CenturyTel has requested competitive classification of its business services, other than exchange access service, in its Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges.

Section 392.245.5, provides as follows:

> Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can

be considered an entity providing "basic local telecommunications services."[14] The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."[15]

Section 392.245.5(3), defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."[16]

CenturyTel asserts that, other than exchange access services, its residential services in the Branson, Exeter, and Rockaway Beach exchanges, and its business services in the Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges should be classified as competitive. As the party asserting the positive of a proposition, CenturyTel has the burden of proving that proposition.[17]

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by CenturyTel and Staff in making its decision in this case.[18]

Decision

The undisputed evidence establishes that for residential customers in the Branson, Exeter, Rockaway Beach exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications

[14] Section 392.245.5(1), RSMo Cum. Supp. 2007.
[15] Section 392.245.5(2), RSMo Cum. Supp. 2007.
[16] Section 386.020(52), RSMo 2000.
[17] *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).
[18] *See*, *e.g.*, *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 supra.

service within the meaning of Section 392.245.5(1) to residential customers in the Branson, Exeter, and Rockaway Beach exchanges. Therefore, the Commission concludes that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in the Branson, Exeter, and Rockaway Beach exchanges should be granted.

The undisputed evidence establishes that for business customers in the Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). The undisputed evidence also establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to business customers in the Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges.

CenturyTel submitted tariff changes which will implement the competitive classification designations. Therefore, the Commission shall approve the tariff sheets as substituted.

In addition, the evidence in this matter suggests that although CenturyTel has a facilities-based competitor in the Branson and Rockaway Beach exchanges, that competitor is providing local voice service without a certificate from the Commission. The Commission shall direct its Staff to investigate the provisioning of service by Suddenlink in the Branson and Rockaway Beach exchanges and file a complaint or any other appropriate enforcement action with the Commission.

IT IS ORDERED THAT:

1. CenturyTel of Missouri, LLC's residential services, other than exchange access service, are classified as competitive in the Branson, Exeter, and Rockaway Beach exchanges.

2. CenturyTel of Missouri, LLC's business services, other than exchange access service, are classified as competitive in the Dardenne, Hallsville, Warrenton, Winfield, and Wright City exchanges.

3. CenturyTel of Missouri, LLC's proposed tariff revision (Tariff No. YI-2008-0442) is approved, as substituted, to become effective on February 24, 2008. The tariff sheets approved are:

PSC MO. NO. 1, Section 4

3rd Revised Sheet 1, Cancels 2nd Revised Sheet 1
2nd Revised Sheet 17.3, Cancels 1st Revised Sheet 17.3
Original Sheet 17.6.1
Original Sheet 17.6.2
Original Sheet 17.7.1
Original Sheet 17.10.1
Original Sheet 17.11.1
Original Sheet 17.11.2
Original Sheet 17.11.3

4. The Staff of the Missouri Public Service Commission shall investigate the provisioning of service by Cebridge Communications, LLC, d/b/a Suddenlink Communications, in the Branson and Rockaway Beach exchanges and file a complaint or any other appropriate enforcement action with the Commission.

5. This order shall become effective on February 24, 2008.

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

Application of Kansas City Power & Light Company for Authority to Issue Debt Securities

Case No. EF-2008-0214
Decided February 14 2008

Evidence, Practice and Procedure §5. An anonymous letter not supported by a sworn witness who is subject to cross-examination constitutes mere hearsay and should not be considered by the Commission in reaching a decision in a contested case.

Electric §38. The Commission authorized the applicant utility to issue new debt securities through December 31, 2009, in principal amount not to exceed $1.4 billion.

ORDER APPROVING FINANCING

On December 27, 2007, Kansas City Power & Light Company ("KCPL") filed an application asking the Missouri Public Service Commission for authority to increase from $635 million to $1.4 billion the authorization to issue debt securities granted by the Commission in Case No. EF-2005-0498. KCPL made its request pursuant to Sections 393.180 and 393.200, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.120. KCPL further requested that the Commission issue an order granting its request by March 1, 2008.

KCPL seeks Commission authority to:

(a) issue up to $1.4 billion principal amount of debt securities through December 31, 2009, which may take the form of secured or unsecured senior or subordinated debt, "fall away" mortgage debt, or subordinated debt issued to special purpose financing entities, and with fixed or variable interest rates not to exceed 9% on fixed-rate notes or the initial rate on any variable rate or remarketed notes;

(b) to enter into interest rate hedging instruments with one or more counter parties in conjunction with the debt securities issued under this authorization; and

(c) to execute all documents necessary for the issuance and take all other action necessary for the issuance and maintenance of the debt securities authorized in this proceeding.

KCPL notes that it is a signatory party to the Stipulation and Agreement in Case No. EO-2005-0329 (EO-2005-0329 Stipulation), and that Appendix B to that agreement outlines the Company's proposed financing plan for the 2005-2009 period. Thus, KCPL's application is directly related to KCPL's Experimental Regulatory Plan which the Commission approved on August 5, 2005, in Case No. EO-2005-0329. The Commission later approved amendments to that Plan on August 24, 2005. KCPL further states that proceeds of the securities will be used to refinance outstanding short-term debt and to continue implementing the Comprehensive Energy Plan described in the EO-2005-0329 Stipulation. The Commission previously authorized KCPL to issue up to $635 million principal amount of debt securities through December 31, 2009, in Case No. EF-2005-0498.[1] KCPL states that the financing authority granted in

[1] Commission Case No. EF-2005-0498, Report and Order, issued November 3, 2005.

Case No. EF-2005-0498 anticipated financing and refinancing requirements for the 2005-2009 period, as outlined in Appendix B of the EO-2005-0329 Stipulation. KCPL further states that the request for increasing the authorized indebtedness is based upon projected changes in the cost of capital investments contemplated in the EO-2005-0329 Stipulation and KCPL's desire for conditional flexibility to issue long-term debt in 2009 to finance 2010 requirements.

On January 23, 2008, Praxair, Inc., filed an application to intervene in this case. No party opposed Praxair's intervention request, and the Commission granted Praxair intervention on February 4, 2008. No other intervention requests were filed.

The Commission's Staff filed its Recommendation and Memorandum on January 31, 2008. Staff recommends that the Commission authorize KCPL to issue new debt securities through December 31, 2009 in principal amount not to exceeding $1.4 billion, pending receipt of the definite terms of issuance, and subject to the nine conditions stated in Staff's Memorandum.

Because Staff proposed additional conditions, the Commission ordered KCPL to respond to Staff's Recommendation. KCPL responded on February 5, 2008, and stated that it accepted Staff's conditions. Praxair filed a response to Staff's Recommendation on February 13, 2008. In its response Praxair expressly stated that it was not requesting a hearing and that the conditions proposed in Staff's Recommendation appeared reasonable. Praxair merely asked the Commission to closely examine the amount KCPL is asking for authority to borrow and the manner in which KCPL's existing rate base assets and generating plants should be encumbered thereby. No party filed an objection to Staff's Recommendation and Memorandum.

Praxair attached to its response an anonymous letter and indicated that the Commission might wish to consider the contents of that letter in making its decision in this case. Given that this case constitutes a contested case under § 536.010(4) RSMo 2000, the Commission declines to consider the letter in question. An anonymous letter not supported by a sworn witness who is subjected to cross-examination constitutes mere hearsay and should not be considered by the Commission in reaching a decision in a contested case.

Based upon consideration of the verified application, the verified recommendation of its Staff, and Praxair's response, the Commission determines that the Company's request is reasonable and not

detrimental to the public interest. Accordingly, the Commission will approve the application subject to the conditions recommended by Staff.

IT IS ORDERED THAT:

1. Kansas City Power & Light Company is authorized to consummate the transactions contemplated in the application, subject to the following nine conditions recommended by the Commission's Staff and agreed to by the company:

a. That the Company shall submit to the Financial Analysis Office of the Commission any information concerning deviations from the stated use of the funds or any information that would materially change the pro-forma capitalization and financial ratios associated with its Application;

b. That the interest rate for any debt issuance covered by the Application is not to exceed nine (9) percent;

c. That the Company shall submit to the Financial Analysis Office of the Commission any information concerning communication with credit rating agencies concerning these issuances;

d. That the Application is approved for the purposes stated in the Application and not for operating expenses;

e. That at no time will the Company's total borrowings, including all instruments, exceed its regulated rate base;

f. That KCPL shall file with the Commission within ten (10) days of the issuance of any debt securities authorized pursuant to a Commission order in this proceeding, a report including the amount of debt securities issued, date of issuance, interest rate (initial rate if variable), maturity date, redemption schedules or special terms, if any, use of proceeds, estimated expenses, portion subject to the fee schedule and loan or indenture agreement concerning each issuance;

g. That KCPL shall provide the Commission Staff an update of the Company's financial condition on or before September 1, 2009 related to the Company's short-term debt balance discussed in paragraph 11 of the Application;

h. That nothing in the Commission's order is to be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the

Commission reserves the right to consider the rate making treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding; and

i. That at no time during the term of this authorization shall KCPL use the debt authority granted by the Commission to manage its debt-to-capitalization ratio in a fashion inconsistent with the Stipulation and Agreement of KCPL's Experimental Regulatory Plan in Case No. EO-2005-0329, i.e., in a manner that would jeopardize its credit rating.

2. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes, and the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions, and their results in cost of capital, in any later proceeding.

3. This order shall become effective on February 24, 2008.

4. This case shall be closed on February 25, 2008.

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur.

Voss, Regulatory Law Judge

In the Matter of Spectra Communications Group, LLC, d/b/a CenturyTel's Request for Competitive Classification Pursuant to Section 392.245.5, RSMo.

Case No. IO-2008-0244
Decided: February 14, 2008

Telecommunications §40. The Commission granted Spectra Communications Group, LLC's request for competitive classification pursuant to Section 392.245.5, RSMo, for residential services, other than exchange access service, for the Aurora exchange.

ORDER GRANTING COMPETITIVE CLASSIFICATION AND APPROVING TARIFF SHEETS

Syllabus: In this Order, the Missouri Public Service Commission grants Spectra Communications Group, LLC, d/b/a CenturyTel's request, pursuant to Section 392.245.5, RSMo Cum. Supp. 2007, for competitive classification of the residential services, other than exchange access service, in its Aurora exchange. In addition, the Commission approves the tariff sheets Spectra filed to implement that classification and provide a rate decrease.

Procedural History

On January 25, 2008, Spectra filed its verified Application for Competitive Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2007. In its application, Spectra requested that the Commission classify the residential services it offers in its Aurora exchange, other than exchange access services, as competitive.

Concurrent with the filing of its application, Spectra filed proposed tariff sheets which reflected the requested competitive classification and had an effective date of February 24, 2008. Although Spectra stated in its application that no price changes were being made in its tariffs,[1] those tariff sheets contained a price decrease for the subject exchange.

On January 31, 2008, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date, in which the Commission provided notice of Spectra's application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media, that any party wishing to intervene in the proceeding must file an application no later than February 8, 2008. This order also established a full procedural schedule and reserved a date for an evidentiary hearing on Spectra's application. There were no requests for intervention.

On February 8, 2008, Public Counsel filed a pleading asking the Commission to require strict compliance with the statutory requirements relating to the remainder of Spectra's application. Public Counsel's pleading further indicated that although Public Counsel would not stipulate that those exchanges exhibit sufficient competition to justify competitive classification, it was *not* requesting an evidentiary hearing and had no objection to the Commission deciding the case on the basis of the existing record before it.

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[1] Application, para. 7.

Also on February 8, 2008, the Staff of the Missouri Public Service Commission filed a verified pleading recommending that the Commission approve Spectra's application with regard to the requests for competitive classification. Staff also recommended that the Commission approve the tariff sheets.

On February 13, 2008, Spectra filed substitute tariff sheets designed to remove the rate change. Staff filed a supplemental recommendation on February 14, 2008, recommending approval of the tariff sheets as substituted.

Overview

Spectra is an incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.[2] The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.[3] The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."[4] Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

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[2] Section 392.245.5(6), RSMo Cum. Supp. 2007.
[3] Section 392.245.5(1), RSMo Cum. Supp. 2007.
[4] Section 392.245.5(2), RSMo Cum. Supp. 2007.

Spectra's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier providing residential services in the exchange.

Findings of Fact

The Missouri Public Service Commission, having reviewed Spectra's pending tariff, the verified application and supporting documentation, and Staff's verified recommendation, memorandum and supporting documentation, which are admitted into evidence, makes the following findings of fact.

Spectra is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.[5] Spectra is a large ILEC subject to price cap regulation.[6]

In its application, Spectra requested that the Commission classify as competitive its residential services, other than exchange access service, in the Aurora exchange. Spectra also filed proposed tariff sheets to reflect those classifications.[7] In support of this request, Spectra filed its verified application listing the facilities-based and wireless carriers competing in the exchange. Spectra identified Cebridge Communications, LLC, d/b/a Suddenlink Communications, as providing facilities-based residential phone service in the Aurora exchange. Spectra also stated that Verizon, Alltel, US Cellular, and Sprint/Nextel were providing wireless services in the exchange.

Staff provided its verified recommendation, supporting memorandum, and affidavits in which it discussed its own investigation into the companies providing wireless and wireline service to the exchange. According to Staff's recommendation, there is at least one facilities-based wireline carrier and at least one wireless carrier serving Spectra's Aurora exchange who are not affiliated with Spectra but provide basic local phone service to at least two residential customers located within that exchange. Further, Staff states that the competing carriers have local numbers available for use by residential customers in that exchange.[8]

Staff states that it has no objection and recommends competitive classification for Spectra's residential services, other than

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[5] *Spectra of Missouri, LLC's Application for Competitive Classification*, para. 1.
[6] *Id*.
[7] *Id*. at Exhibit B.
[8] Staff Recommendation, page 1, and Appendix A.

exchange access service, in the Aurora exchange. Staff also recommends that the Commission approve the tariff sheets.

The Commission finds that the facts as submitted in the verified application, verified Staff recommendation and supporting memorandum, supplemental recommendation, and the related attached materials are reliable and support the grant of competitive classification in the requested exchanges.

The Commission finds that in the Aurora exchange, facilities-based local voice service is being provided to at least two residential customers by Suddenlink.[9] In addition, the Commission finds that there is at least two non-affiliated wireless services carrier, U.S. Cellular and Sprint/Nextel, providing service to residential customers in the Aurora exchange.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), which provides as follows:

> Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Spectra is an incumbent local exchange telecommunications company and has requested competitive classification of its residential services, other than exchange access service, in its Aurora exchange.

Section 392.245.5, provides as follows:

> Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications

[9] Suddenlink is a cable television provider offering local voice service using its own or one of its affiliates' facilities.

> service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."[10] The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."[11]

Section 392.245.5(3), defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."[12]

Spectra asserts that, other than exchange access services, its residential services in the Aurora exchange should be classified as competitive. As the party asserting the positive of a proposition, Spectra has the burden of proving that proposition.[13]

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Spectra and Staff in making its decision in this case.[14]

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[10] Section 392.245.5(1), RSMo Cum. Supp. 2007.
[11] Section 392.245.5(2), RSMo Cum. Supp. 2007.
[12] Section 386.020(52), RSMo 2000.
[13] *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).
[14] *See, e.g.*, *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 supra.

Decision

The undisputed evidence establishes that for residential customers in the Aurora exchange there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to residential customers in the Aurora exchange. Therefore, the Commission concludes that Spectra's application for competitive classification of its residential services, other than exchange access services, in the Aurora exchange should be granted.

As required by the statute, Spectra submitted tariff changes to implement the competitive classification of its services. That tariff sheet carries an effective date of February 24, 2008. Since the submitted tariff sheets, as substituted, corresponds with the Commission's decision, that tariff will be approved.

In addition, the evidence in this matter suggests that although CenturyTel has a facilities-based competitor in the Aurora exchange, that competitor is providing local voice service without a certificate from the Commission. The Commission shall direct its Staff to investigate the provisioning of service by Suddenlink in the Aurora exchange and file a complaint or any other appropriate enforcement action with the Commission.

IT IS ORDERED THAT:

1. Spectra Communications Group, LLC, d/b/a CenturyTel's residential services, other than exchange access service, are classified as competitive in the Aurora exchange.

2. Spectra Communications Group, LLC, d/b/a CenturyTel's proposed tariff revision (Tariff No. YI-2008-0443) is approved, as substituted, to become effective for service on or after February 24, 2008. The tariff sheets approved are:

PSC MO. NO. 1, Section 4

3rd Revised Sheet 1, Cancels 2nd Revised Sheet 1
Original Sheet 17.1.1

3. The Staff of the Missouri Public Service Commission shall investigate the provisioning of service by Cebridge Communications, LLC, d/b/a Suddenlink Communications, in the Aurora

exchange and file a complaint or any other appropriate enforcement action with the Commission.

4. This order shall become effective on February 24, 2008.

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur.

Dippell, Deputy Chief Regulatory Law Judge

In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Platte County, Missouri, as an Expansion of its Existing Certified Area

Case No. GA-2007-0289, et al.
Decided: February 14, 2008

Certificates §3. The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve. A public utility cannot refuse service, "when exercising its public function; that is, furnishing something, a necessity, that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions."

Certificates §3. The Commission appropriately acknowledged MGE's existing certificates of convenience and necessity because the Commission is entitled to interpret its own orders and to ascribe to them a proper meaning and, in so doing, the Commission does not act judicially but as a fact-finding agency. Also, the Commission has the authority to issue a CCN even if it overlaps another public utility's area of service.

Certificates §34. The Commission acknowledged that MGE has a Commission-approved certificate of convenience and necessity for disputed sections in Platte County, Missouri.

Certificates §43. The Commission acknowledged that MGE has a Commission-approved certificate of convenience and necessity for disputed sections in Platte County, Missouri.

Gas §3. The Commission acknowledged that MGE has a Commission-approved certificate of convenience and necessity for disputed sections in Platte County, Missouri.

APPEARANCES

Roger W. Steiner, Attorney at Law, Sonnenschein, Nath & Rosenthal, L.L.P, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for Missouri Gas Energy.
Jeffrey A. Keevil, Attorney at Law, Stewart & Keevil, L.L.C., 4603 John Garry Drive, Suite 11, Columbia, Missouri 65203, for The Empire District Gas Company.
Robert Berlin, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.
Marc D. Poston, Senior Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Procedural History

On January 31, 2007, Missouri Gas Energy ("MGE"), a Division of Southern Union Company, filed an application with the Missouri Public Service Commission, pursuant to Section 393.170, RSMo 2000,[1] requesting that the Commission grant it authority to "construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service to the public pursuant to its approved rates, rules and regulations, in Sections 13 and 14, Township 52 North, Range 35 West in Platte County, Missouri." In its application, MGE included a map showing the sections in Platte County for which it sought certification and identifying surrounding sections that it claimed it were already included in its authorized service area. According to MGE, Sections 1, 2, 3, 10, 11 and 12 in Township 52 North, Range 35 West and Sections 4, 5 and 6 in Township 52 North, Range 34 West in Platte County are included in its authorized service area.

On March 13, 2007, The Empire District Gas Company ("Empire") was granted intervention. In its request for intervention, Empire claimed that it, not MGE, was authorized to provide natural gas service in Sections 1, 2, 3, 10, 11 and 12 in Township 52 North, Range

[1] All statutory references throughout this order are to RSMo 2000 unless otherwise noted.

35 West and Sections 4, 5 and 6 in Township 52 North, Range 34 West in Platte County. Empire further asserted that it already had facilities in Section 12, which is adjacent to Sections 13 and 14 for which MGE is seeking a certificate. Therefore, Empire concluded that: (1) MGE was encroaching into its certificated territory; (2) Empire was fully capable of providing natural gas service to these two sections; and, (3) the facts did not support granting a certificate to MGE.

Ultimately, Empire filed its own application seeking a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service in the same two sections of land as MGE's application (Sections 13 and 14, T52N, R35W[2] in Platte County, Missouri). Empire's application also sought a certificate for Sections 15, 22, 23 and 24 in the same township and range. Empire also asked the Commission to clarify which company has a certificate for Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W and Sections 4, 5 and 6 in T52N, R34W in Platte County, sections in which both MGE and Empire claim to have Commission authority to provide natural gas service.

Pursuant to Commission Rule 4 CSR 240-2.110(3), the two cases were consolidated on May 31, 2007. A procedural schedule was adopted and an evidentiary hearing was scheduled to be held on October 25-26, 2007.

Issues Requiring Commission Decision

The issues before the Commission, as formulated by MGE, Empire, the Office of Public Council ("OPC") and the Staff of the Missouri Public Service Commission ("Staff"), and as adopted by the Commission, are:[3]

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[2] The remainder of the Report and Order will adopt this format for abbreviating township and range. Section 140.180, RSMo 2000.

[3] When filing this list of issues, the parties asserted that that they did not agree that any particular issue listed was, in fact, a valid or relevant issue. The parties further asserted that the issues list they proposed was a "non-binding" list and not to be construed as impairing any party's ability to argue about any of the issues listed, or any other related matters. The Commission adopted the issues list proposed by the parties with the caveat that the parties' framing of the issues may not accurately reflect the material issues to this matter under applicable statutes and rules. See *List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements*, filed October 5, 2007 and *Order Adopting List of Issues, Order of Opening Statements, List and order of Witnesses and Order of Cross Examination*, Effective October 10, 2007.

1. Who has a certificate of convenience and necessity ("CCN") to serve Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5 and 6 of T52N, R34W all in Platte County, Missouri?

2. Should MGE be granted a CCN to serve Sections 13 and 14 of T52N, R35W in Platte County, Missouri?

3. Should Empire be granted a CCN to serve Sections 13, 14, 15, 22, 23 and 24 of T52N, R35W in Platte County, Missouri?

4. Has the Commission granted MGE a CCN authorizing MGE to provide natural gas service for Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of T52N, R35W; Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W; Sections 1 and 12 of T52N, R36W; and Sections 4, 5 and 6 of T52N, R33W, all in Platte County, Missouri?[4] If the Commission has not granted MGE a CCN authorizing MGE to provide natural gas service in these sections of land, should the Commission order MGE to correct the service territory descriptions in its existing tariffs by excluding references to these sections?

5. Has MGE constructed, installed, owned, operated, controlled, managed and/or maintained natural gas distribution facilities (gas plant) and/or provided natural gas service without first obtaining the required authorization from the Commission in Sections 10, 11, 12, 13 and 14 of T52N, R35W, in Platte County, Missouri? If so, what remedy(ies) or relief should the Commission order?

6. Should the Commission order MGE to formally provide notice to Empire of any future contact MGE has with developers in areas adjacent to the Empire service area boundaries in Platte County so that Empire can

[4] Section 6 of T52N, R33W was inadvertently included in MGE's application and the issues list. This section is not listed in MGE's tariff of its certificated service areas.

> determine where and when future development is occurring along its boundaries?

The Commission also adopted the issue as to whether MGE or Empire were providing safe and adequate service. Consequently, if at the hearing the Commission found evidence of unsafe or inadequate service being provided by either company, it put the parties on notice that it might authorize its Staff to pursue a complaint action and/or seek penalties for any established violations of State statutes, Commission rules or the company's tariffs.

Evidentiary Hearing and Case Submission

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing was convened and concluded on October 25, 2007, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of 7 witnesses and received 31 exhibits into evidence.

Post-hearing briefs and proposed findings of fact and conclusions of law were filed according to the post-hearing procedural schedule. After two amendments to the post-hearing procedural schedule were ordered the final deadline for these filings was set for December 21, 2007, and the case was deemed submitted for the Commission's decision on that date.[5]

Empire's Post-Hearing Motion to Strike Portions of MGE's Brief

On December 28, 2007, Empire filed a motion to strike certain portions of MGE's post-hearing brief and an attachment thereto. Empire claims that MGE included in its brief a section titled "Comments of Affected Customers," and a document captioned Exhibit 1, purporting to be the statement of the developer of the Seven Bridges Subdivision ("Seven Bridges"). Empire claims that this late-filed "statement" violates Commission Rule 4 CSR 240-2.130 establishing the procedure for pre-filed testimony.

The practice of allowing pre-filed testimony is designed to give parties notice of the parties' claims, contentions and evidence, promote judicial economy, and eliminate unfair surprise at hearing. Empire asserts that to allow MGE to unfairly supplement the evidence with what

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[5] "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

amounts to additional testimony not only creates the issue of unfair surprise, but that for the Commission to accept this evidence would violate due process because Empire did not have an opportunity to cross-examine this purported new witness.

MGE responded to the motion to strike on January 3, 2008. In its response, MGE maintains that it included the statement of Mr. David Barth, the owner and developer of Seven Bridges in response to Commissioner Murray's questions at hearing concerning how the customers of Seven Bridges felt about the prospect of having to switch providers of natural gas service. MGE asserts that the statement is relevant to the Commission's decision and believes the statement may be considered.

The Transcript reflects that Commissioner Murray did indeed ask questions as to whether the parties or their attorneys have had contact with the customers affected by the determination in this case.[6] Commissioner Murray specifically asked if any party knew what the customers that would be affected by the Commission's decision thought about the situation.[7]

While Commissioner Murray did ask questions at the hearing regarding the positions of the affected customers, the record reveals that Commissioner Murray did not request late-filed exhibits be filed in this regard. The record in this case was deemed submitted on December 21, 2008, when post-hearing briefs and proposed findings of fact and conclusions of law were filed with the Commission. MGE has not filed a proper motion requesting the Commission to re-open the matter for receipt of additional evidence. Consequently, MGE's offering of Mr. Barth's statement would indeed be a violation of the Commission's rules on testimony. While the Commission could have cured any due process issue by allowing additional response time for Empire, the Commission finds that MGE's attempt to supplement the record in this fashion is inappropriate and Empire's motion to strike shall be granted.[8]

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[6] Transcript pp. 66-67.

[7] No local public hearings were requested in this matter by any person, group or entity, including the Office of the Public Counsel, and none were held by the Commission. On page 67 of the Transcript, attorney Marc Poston, representing OPC further stated that no responses or comments were received from any customer or member of the public in regard to this matter.

[8] The Commission further notes that because Mr. Barth's statement was not notarized, it was a hearsay statement. While hearsay testimony may be considered if no objection is made, like all probative evidence received without objection in a contested case must be

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.[9] Section 536.090 provides, in pertinent part:

> "Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order."

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.[10] Nonetheless, the following formulation is often cited:

> The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.[11]

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considered in administrative hearings, hearsay evidence does not qualify as competent and substantial evidence upon the whole record essential to the validity of a final decision, finding, rule of order of an administrative officer or body under Section 22, Art. V of the Missouri Constitution. *Lacey v. State Bd. of Registration for the Healing Arts,* 131 S.W.3d 831, 842 (Mo. App. 2004); *State ex rel. De Weese v. Morris*, 359 Mo. 194, 200-201, 221 S.W.2d 206,209 (Mo. 1949); Section 536.070(8).

[9] *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n,* 103 S.W.3d 813, 816 (Mo. App. 2003); St*. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n,* 24 S.W.3d 243, 245 (Mo. App. 2000).

[10] *Glasnapp v. State Banking Bd.,* 545 S.W.2d 382, 387 (Mo. App. 1976).

[11] *Id.* (*quoting* 2 Am.Jur.2d *Administrative Law* § 455, at 268).

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."[12] Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."[13]

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the factfinder's discretion,[14] but witness credibility is solely a matter for the factfinder, "which is free to believe none, part, or all of the testimony."[15] An administrative agency, as factfinder, also receives deference when choosing between conflicting evidence.[16]

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[12] *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n,* 806 S.W.2d 680, 684 (Mo. App. 1991) (*quoting St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n,* 701 S.W.2d 745, 754 (Mo. App. 1985)).

[13] *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (*relying on St. ex rel. Rice v. Pub. Serv. Comm'n,* 359 Mo. 109, 220 S.W.2d 61 (1949)).

[14] *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.,* 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under section 490.065.1, RSMo 2000, the factfinder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh,* 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

[15] *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl,* 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel,* 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell,* 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark,* 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc*., 782 S.W.2d 170, 173 (Mo. App. 1990).

[16] *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.,* 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of the State of Mo*., 37 S.W.3d 287(Mo. App. 2000)*; State ex rel. Midwest Gas Users' Ass'n. v. Public Service Com'n of the State of Mo*., 976 S.W.2d 485(Mo. App. 1998); *State ex rel. Conner v. Public Service Com'n*, 703 S.W.2d 577 (Mo. App. 1986).

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.[17] And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.[18] Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.[19]

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.[20] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.[21] Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.[22]

Findings of Fact Regarding the Parties

1. Missouri Gas Energy ("MGE") is a division of Southern Union Company with its principal office located at 3420 Broadway, Kansas City, Missouri 64111.[23]

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[17] *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA,* 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus,* 478 F.Supp. 125, 131 (D.C.Cir.1979).

[18] *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness,* 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

[19] *Id*.

[20] *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

[21] *Id*.

[22] *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). *See also State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n,* 972 S.W.2d 397, 401 (Mo. App. 1998).

[23] MGE's Application for a Certificate of Public Convenience and Necessity (MGE's Application), p. 1, paragraphs 1-2, filed January 31, 2007. See also Case No. GA-2001-509.

2. Southern Union Company is incorporated under the laws of the State of Delaware and is authorized to do business in Missouri as a foreign corporation under its registered fictitious name of MGE.[24]

3. MGE provides natural gas service in the Missouri counties of Andrew, Barry, Barton, Bates, Buchanan, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, Dekalb, Greene, Henry, Howard, Jackson, Jasper, Johnson, Lafayette, Lawrence, McDonald, Moniteau, Pettis, Platte, Ray, Saline, Stone, and Vernon.[25]

4. MGE has more than 8000 miles of main and more than 500,000 service lines in its Missouri service areas.[26]

5. MGE is a "gas corporation" and a "public utility" as those terms are defined in Section 386.020.[27]

6. The Empire District Gas Company ("Empire") is a corporation organized and existing under the laws of the State of Kansas, with its principal office located at 602 Joplin Street, Joplin, Missouri 64802.[28]

7. Empire is authorized to do business in Missouri as a foreign corporation and is appropriately registered with the Missouri Secretary of State.[29]

8. Empire provides natural gas service in the Missouri counties of Cooper, Henry, Johnson, Lafayette, Morgan, Pettis, Platte, Ray, Saline, Vernon, Chariton, Grundy, Howard, Linn, Atchison, Holt, Nodaway, Andrew and Livingston.[30]

9. Empire is a "gas corporation" and a "public utility" as those terms are defined in Section 386.020.[31]

10. The Office of the Public Counsel ("OPC") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."[32] Public Counsel "shall have

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[24] *Id.*
[25] *Id*.
[26] Transcript p. 84, lines 19-23.
[27] MGE's Application for a Certificate of Public Convenience and Necessity (MGE's Application), p. 2, paragraphs 3, filed January 31, 2007. See also Case No. GA-2001-509.
[28] Empire's Application for a Certificate of Public Convenience and Necessity (Empire's Application), p. 1, paragraphs 1, filed May 30, 2007.
[29] *Id*. at p. 2, paragraph 2. See also Case No. GO-2006-0205.
[30] *Id*. at p. 1, paragraph 1.
[31] *Id*.
[32] Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

discretion to represent or refrain from representing the public in any proceeding."[33]

11. The General Counsel of the Missouri Public Service Commission "represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . ."[34]

Findings of Fact Concerning the Types of CCNs as They Relate to the Disputed Service Territory

12. The Commission has the authority to grant certificates of service authority for the provision of natural gas service pursuant to Section 393.170.

13. The Commission has traditionally exercised its certificating authority to grant three different types of certificates for the provision of certain natural gas services, i.e. a line certificate, an area certificate and a transport certificate.[35]

14. A "line certificate" is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain a distribution system to provide service along, and a reasonable distance from, a specific distribution line.[36]

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[33] Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id*.

[34] Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1). Additionally, the General Counsel "if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him." *Id*.

[35] Staff Exh. 20, Straub Rebuttal, p. 5, lines 10-23, p. 6, lines 1-22, p. 7, lines 1-10.

[36] *Id*.

15. An "area certificate" is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain a distribution system to provide service in a specific service area, with the requested service area being defined by a metes and bounds, or township-range-section format.[37]

16. A "transport certificate" or "transmission certificate" is a type of certificate that is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain facilities for the purpose of transporting energy (gas or electric) from its origin or one portion of the Local Distribution Company ("LDC") service area to another portion of its service area. This certificate is required when a LDC must transport or supply facilities outside of its authorized service area and does not automatically allow the LDC to provide service from the transport facilities to customers that may be located in or near the area.[38]

17. In addition to both MGE and Empire seeking an area certificate for Sections 13 and 14 of T52N, R35W, and Empire seeking an area certificate for Sections 15, 22, 23, and 24 of T52N, R35W, the parties dispute the current status of CCNs each currently has in other specific sections in Platte County.

18. While the Commission, in this order, will ultimately decide the legal issues in this matter, the dispute concerning the status of MGE's and Empire's CCNs in Platte County, as they relate to certificate type, is appropriately framed as follows:

> a.) The Staff of the Missouri Public Service Commission ("Staff") has identified 22 Sections of land in Platte County it, and Empire, believe are erroneously listed in MGE's tariff as having Commission-approved CCNs to provide customers with natural gas service, i.e. having an area certificate.[39]

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[37] *Id*.

[38] *Id.*; Staff Exhs. 7-9. Throughout Mr. Straub's pre-filed rebuttal testimony he uses the word "transport" to describe these certificates; however, during the live testimony at hearing the parties used the term "transmission certificate." The term "transmission certificate" as referenced by witness Straub, is defined in the same manner as Mr. Straub defined a "transport certificate" in his prefiled testimony. Transcript p. 82, line 22, p. 83, lines 4, 8, p. 118, line 19, p. 271, line 5, Staff Exh. 20, Straub Rebuttal, p. 6, lines 5-15.

[39] Staff Exhs. 1-3 and 17-21.

b.) The 22 disputed Sections are: Sections 4, and 5 of T52N, R33W; Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of T52N, R35W; and Sections 1 and 12 of T52N, R36W.[40]

c.) Staff and Empire maintain that MGE has no Commission-approved certificate of any type for Sections 4, and 5 of T52N, R33W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6, of T52N, R35W, and Section 1 of T52N, R36W.[41]

d.) Staff and Empire also maintain that MGE only has a line certificate for Sections 7, 8, 9, 10, 11 and 12 of T52N, R35W and Section 12 of T52N, R36W.[42]

e.) Included in these 22 Sections are 9 Sections where MGE and Empire each claim they are authorized provide customers with natural gas service, i.e. each claim to have an area certificate.[43]

f.) These 9 sections of alleged over-lap are: Sections 4, 5 and 6 in T52N, R34W and Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W.[44]

Findings of Fact Regarding MGE's CCNs

19. On May 24, 1955, in Case Number 12,632, the Commission authorized Gas Service Company ("GSC"), MGE's predecessor in interest, to construct, operate and maintain the infrastructure necessary to supply gas to the Mid-Continent Airport ("MCI Airport" - also known as Kansas City International Airport).[45]

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[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), pages 108-116, decided May 24, 1955; Order Modifying Commission Report and Order Dated May, 24, 1955, Case Number 12,632, effective June 24, 1955; Staff Exhs. 1, 4, 7-9; Staff Exh. 17, Warren Direct, p. 3, lines 14-

20. The exact language used by the Commission for this grant appeared in ordered paragraph number 2 of the May 24, 1955 order and reads as follows:

> That the Gas Service Company be and hereby authorized to construct, operate and maintain a ten-inch pipe line for the purpose of supplying natural gas to the Mid-Continent Airport site as set forth in Exhibit "B" attached to its supplemental application which is hereby referred to and made a part hereof.[46]

21. Exhibit "B" to the May 24, 1955 Report and Order in Case Number 12,632 demonstrates that the sections of land for the location of the MCI Airport included all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.[47]

22. The Sections, or portions thereof, described in Finding of Fact Number 21 cover approximately eight to nine square miles of land.[48]

23. The May 24, 1955 Report and Order in Case Number 12,632 authorizing the construction of a ten-inch supply line to serve MCI Airport was amended by a subsequent order, effective on June 24, 1955, authorizing the construction of a twelve-inch supply line.[49]

20; Staff Exh. 18, Warren Rebuttal, p. 1, lines 24-27 and Schedule 5; Staff Exh. 19, Warren Surrebuttal, p. 3, lines 21-23; MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 73, lines 24-25, p. 74, lines 1-4. It should be noted that the Commission's May 24, 1955 Report and Order in Case Number 12,632 does not use the terms "transport," "line" or "area" to distinguish or describe the CCNs it was issuing.

[46] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), ordered paragraph 2, decided May 24, 1955; Staff Exh. 7. Transcript p. 73, lines 17-25, p. 75, lines 14-15.

[47] Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.); Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. See also Exhibit 3 to the *Application of the Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation, and Maintenance of a Natural Gas Distribution System and All Connecting Lines Required therewith within Platte County, Missouri*, Case Number 12,674, consolidated with Case Number 12,632.

[48] See Footnote 45, supra.

[49] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case

24. After receiving this grant of authority, GSC constructed a twelve-inch supply line to provide gas service to the MCI Airport site.[50]

25. The twelve-inch supply line, known as the "Leavenworth Supply Line," is currently owned and operated by MGE, GSC's successor in interest, and starts in the vicinity of East Leavenworth, Missouri and runs east to the MCI Airport.[51]

26. The Leavenworth Supply Line traverses Section 12 of T52N, R36W; Sections 7-12 of T52N, R35W; and Sections 7, 8, and 9 of T52N, R34W, in order to reach the area MGE is certificated to serve immediately around the MCI Airport.[52]

27. The Leavenworth Supply Line runs through the sections of land immediately to the north of Sections 13 and 14 T52N, R35W, the sections for which both companies currently seek an area certificate.[53]

28. In the Conclusions of Law section of the Commission's May 24, 1955 Report and Order in Case Number 12,632, the Commission notes that either GSC or Missouri Public Service Company ("MPSC" -- GSC's competitor) had the capability to provide gas to the airport site, and further states: "However, the use of this 500 Mcf. of firm gas is restricted to the airport site only and neither company would be permitted to interconnect its airport supply line with distribution lines to serve areas outside of the airport."[54]

Number 12,632, 6 Mo. P.S.C. (N.S.), ordered paragraph 2, decided May 24, 1955; *Order Modifying Commission Report and Order Dated May, 24, 1955*, Case Number 12,632, effective June 24, 1955; Staff Exh. 7; Transcript p. 73, lines 17-25, p. 75, lines 14-15.

[50] Staff Exhs. 7, 8 and 9; Transcript p. 75, lines 11-25; *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955; *Order Modifying Commission Report and Order Dated May, 24, 1955*, Case Number 12,632, effective June 24, 1955.

[51] Staff Exh.18, Warren Rebuttal, p. 3, lines 1-7. See also Schedule 2 of this Exhibit and Staff Exh. 1 and 2.

[52] Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9; Transcript p. 74, lines 7-25, p. 75, lines 1-10; Staff Exh.18, Warren Rebuttal, p. 3, lines 1-7. See also Schedule 2 of Staff Exh. 18 and Staff Exh. 1 and 2.

[53] MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3. Staff Exh. 1 and 2.

[54] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), page 114, effective May 24, 1955; Staff Exh. 7.

29. The restriction of use noted by the Commission in its Conclusions of Law section is not repeated in the ordered paragraphs in of the May 24, 1955 Report and Order in Case Number 12,632.[55]

30. As evidenced by Exhibit "B" to the May 24, 1955 Report and Order in Case Number 12,632, the Commission granted GSC, and thus its successor in interest MGE, a combination "line" certificate and "area" certificate to serve the sections of land comprising the location of the MCI Airport, i.e., all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.[56]

31. The Commission's May 24, 1955 Report and Order in Case Number 12,632 granting GSC a line certificate to construct and utilize the Leavenworth Supply Line, by definition, authorized GSC to construct, install, own, operate, control, manage, and maintain a distribution system to provide service along, and a reasonable distance from, the Leavenworth Supply Line running through Section 12 of T52N, R36W, Sections 7-12 of T52N, R35W and Sections 7, 8, and 9 of T52N, R34W.[57]

32. The Commission's May 24, 1955 Report and Order in Case Number 12,632 not only granted GSC a line certificate as described in Finding of Fact Number 31, but also granted GSC an area certificate to construct, install, own, operate, control, manage, and maintain a distribution system to provide service in a specific service area, i.e. the sections of land comprising the location of the MCI Airport;

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[55] Transcript p. 75, lines 11-25, p. 76, lines 1-20, p. 94, lines 18-24, p. 119, lines 14-21, p. 270, lines 23-25, p. 271, lines 1-11. See also Finding of Fact Number 28 and associated Footnote Number 54.

[56] Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. See also Exhibit 3 to the *Application of the Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation, and Maintenance of a Natural Gas Distribution System and All Connecting Lines Required therewith within Platte County, Missouri*, Case Number 12,674, consolidated with Case Number 12,632.

[57] Empire Exh. 4, Gatz Rebuttal, p. 5, lines 21-23, p. 6, lines 1-3; Empire Exh. 5, Gatz Surrebuttal, p. 7, lines 4-23, p. 8, lines 1-8; Staff Exh. 18, Warren Rebuttal, p. 3, lines 9-19. *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955. See also Finding of Fact Number 14, *supra*.

i.e., all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.[58]

33. No party to this action contests the classifications of the certificates that were granted in the Commission's May 24, 1955 Report and Order in Case Number 12,632, or the authorized uses for the certificates described in Findings of Fact Numbers 14, 15, 30, 31, or 32.[59]

34. The reason for the restriction that was placed on the use of the Leavenworth Supply Line for those sections of land not encompassed within the MCI Airport location was concern over jeopardizing the available supply of natural gas to the City of St. Joseph and the area surrounding the city because the gas for the Leavenworth Supply Line was to be drawn from 12-inch line terminating in St. Joseph and serving multiple communities in route thereto.[60]

35. No company besides GSC had any type of CCN for Sections 10, 11, and 12 of T52N, R35W at the time the restriction was imposed on the Leavenworth Supply Line, and only one reason existed for the Commission's decision to restrict the grant to only a line certificate – the concern over jeopardizing the available supply of natural gas to the City of St. Joseph.[61]

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[58] *Id*. See also Finding of Fact Number 15, *supra*; Findings of Fact Numbers 36, and 37 and Footnotes 62 and 63, *infra*.

[59] Footnotes 56-58, *supra*; Transcript p. 75, lines 11-25, p. 94, lines 18-22.

[60] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, Report and Order, pp. 110-116, effective December 31, 1956; Staff Exhibit 9; Transcript p. 235, lines 3-25, p. 236, line 1.

[61] *Id*. (See all three Reports and Orders in Case Number 12,632); *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in an Area Adjacent to Platte City and Tracy, Platte County, Missouri, as Shown on the Attached Map Marked Exhibit A*, Case No. 13,172.

Staff's witness Henry Warren testified that he believed another reason for the Commission's 1955 restriction was that the Leavenworth Supply Line passed through Empire's predecessor's certificated territory, although there is nothing in the May 24, 1955 Report and Order in Case Number 12,632 that would support such speculation. Transcript p. 235, lines 3-25, p. 236, line 1.

In fact, neither MGE's predecessor in interest Gas Service Company, nor Empire's predecessor in interest, Missouri Public Service Company, were granted an area CCN for Sections 10, 11, and 12 of T52N, R35W (sections the supply line crossed and which allegedly were where both companies currently have area CCNs) until the following year. *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in an Area Adjacent to Platte City and Tracy, Platte County, Missouri, as Shown on*

36. In addition to the combination line/area certificate granted to GSC to serve the MCI Airport location, the Commission's May 24, 1955 Report and Order in Case Number 12,632 also granted GSC an additional CCN to provide natural gas service (an area certificate) when it stated in ordered paragraph number 3:

> That the Gas Service Company be and is hereby granted a certificate of convenience and necessity to provide natural gas service within the following area:
>
> Beginning at the northeast corner of Section 9, Township 52, Range 33, thence west a distance of nine miles to the northwest corner of Section 7, Township 52, Range 34, thence south a distance of nine miles to the southwest corner of Section 19, Township 51, Range 34, thence east a distance of approximately four and a half miles to the center of the south line of Section 23, Township 51, Range 34, thence north a distance of one mile to the center of the north line of Section 23, Township 51, Range 34, thence east a distance one-half mile to the northeast corner of said section, thence north a distance of three miles to the northeast corner of Section 2, Township 51, Range 34, thence a distance of four miles to the southeast corner of Section 33, Township 53, Range 33, thence north a distance of five miles to the point of beginning, all in Platte County, Missouri.[62]

37. The geographical area described in Finding of Fact Number 36, granting GSC an area certificate to provide natural gas service to all of the enclosed sections within those boundaries, totally surrounds and includes the same sections comprising the location of the

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the Attached Map Marked Exhibit A, Case No. 13,172, Report and Order, effective January 27, 1956. Empire Exh. 3, Gatz Direct, RFG Attachment 1.

[62] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955. See also Staff Exhs. 7, 8, and 9.

MCI Airport, i.e., Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.[63]

38. The area certificate granted to GSC in the Commission's May 24, 1955 Report and Order in Case Number 12,632, authorized GSC to provide natural gas service, not only to residential and commercial customers near and outside the boundaries of the MCI Airport site, but also to all of the sections of land within the MCI Airport site, i.e. Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W. GSC was authorized to use its Leavenworth Supply Line to serve the portions of the sections constituting the airport site.[64]

39. The Commission's May 24, 1955 Report and Order in Case Number 12,632, notes that the provision of natural gas service to customers located in the geographical area described in Finding of Fact Number 36, to serve the area outside of the boundaries for the MCI Airport site would come from another part of GSC's distribution system, namely its contiguous certificated area surrounding Kansas City, Missouri as opposed to the Leavenworth Supply Line.[65]

40. The supply of gas to GSC, at the time the Commission issued its May 24, 1955 Report and Order in Case Number 12,632, was from the facilities of an interstate pipeline owned and operated by the Cities Service Gas Company.[66]

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[63] Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. Even without this specific grant of an area certificate, the Commission's order had granted an area certificate for these 14 sections of land when it authorized GSC to serve these sections in order to supply gas to the airport site.

[64] MGE Exh. 3, Noack Surrebuttal, p. 2 lines 9-23; Empire Exh. 5, Gatz Surrebuttal, p. 7, lines 4-23, p. 8, lines 1-8; Staff Exh. 18, Warren Rebuttal, p. 3, lines 9-19. Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9.

[65] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), decided May 24, 1955. See also Staff Exhs. 7, 8, and 9.

[66] *Id.*; *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County,*

41. The CCN granted to GSC in 1955 for the geographical area described in Finding of Fact Number 36 included Sections 7 and 18 of T52N, R34W that are adjacent to Sections 12 and 13 of T52N, R35W, which are two of the primary sections at issue in this matter.[67]

42. In 1956, GSC applied for modification of the certificates granted in the May 24, 1955 Report and Order in Case Number 12,632.[68]

43. In its application, GSC sought the full an unrestricted use of the Leavenworth Supply Line for supplying natural gas service to customers for which it had been certificated in Case Number 12,632 "in and about Platte Woods, Gladstone, Missouri **and other areas near or beyond** the Mid-Continent International Airport." (Emphasis added.)[69]

44. The Commission duly noted in the 1956 Report and Order that GSC was specifically "request[ing] authority now to use the full capacity of the 12-inch line authorized heretofore in this case to provide improved service to customers in and about Platte Woods, Gladstone, Missouri **and other areas near or beyond the Mid-Continent International Airport**." (Emphasis added.)[70]

45. GSC had also specifically sought authority to construct and operate connecting lines to the Leavenworth Supply Line in order to supply its distribution system in Platte Woods and Gladstone, Missouri, cities that were already within their certificated service area (area certificate).[71]

46. In 1956, the Commission modified its 1955 Report and Order in Case Number 12,632 to allow GSC to construct and operate connecting lines to the Leavenworth Supply Line and to make full use of the supply line for all areas depicted in a map made part of the order and marked Exhibit A. This modification is encompassed in ordered paragraph number 1 of the order, which states:

Missouri, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective December 31, 1956. See also Staff Exhs. 7, 8, and 9.

[67] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), at page 116, decided May 24, 1955. See Staff Exh. 2 for a Plat Map depicting the majority of MGE's certificated service area.

[68] *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, Report and Order issued December 18, 1956, effective December 31, 1956; Staff Exhibit 9.

[69] *Id*. See also the case file for Case Number 12,632, particularly GSC's Application.

[70] *Id*.

[71] Id.; Transcript p. 76, lines 4-20.

> Ordered: 1. **That the Gas Service Company be and is hereby authorized to construct, maintain and operate connecting lines that will enable it to make full use of and is hereby authorized to so use the 12 inch line heretofore authorized in orders issued herein on May 24 and June 24, 1955, supplying gas to its distribution system in Platte Woods and Gladstone, Missouri, and in other areas for which the applicant has heretofore been certificated, the route of said lines being more fully described by a map attached to the application and made part thereof and marked Exhibit A which is hereby referred to and made a part hereof**. (Emphasis added.)[72]

47. The Commission concluded, in the 1956 Report and Order, that Cities Service Gas Company, the supplier of gas for GSC's Leavenworth Supply Line, had completed the construction of an additional 16-inch pipeline to serve St. Joseph, Missouri, and the original concern for restricting the use of the Leavenworth Supply Line to supplying the MCI Airport and surrounding area was now alleviated.[73]

48. The map attached to GSC's application and to the Commission's order depicted not only the proposed connecting lines for Platte Woods and Gladstone, but the entire Leavenworth Supply Line.[74]

49. With regard to GSC's proposed expansion and use of the Leavenworth Supply Line, the Commission stated:

> **The facts show that the construction will be in the public interest and that none of the customers now served or to be served in any of the applicant's certificated areas will be adversely affected by the construction as proposed or the change in the use of the present 12 inch line heretofore authorized in this case.** (Emphasis added.)[75]

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[72] *Id*. See Exhibit A delineating the entire Leavenworth Supply Line as the subject of the order.
[73] *Id*.
[74] *Id.*
[75] *Id*.

50. The Commission's 1956 Modification Order granting GSC's request stated that GSC was authorized to make full use of the 12-inch Leavenworth Supply Line in its orders issued herein on May 24 and June 24, 1955, to supply gas to its distribution system in Platte Woods and Gladstone, Missouri, and in other areas for which the applicant has heretofore been certificated. The order **did not state** that it ***only*** authorized full use of the supply line for sections in which it had previously granted GSC an area certificate, but rather states that it authorizes full use of the line **"in other areas for which the applicant has heretofore been certificated**." (Emphasis added.)[76]

51. The language used in the Commission's 1956 Modification Order granting GSC's request to lift the restrictions on use of the Leavenworth Supply Line demonstrates that in ordered paragraph number 1 that the adjective "certificated" modifies the noun "areas," i.e. "certificated areas."

52. The language used in the Commission's 1956 Modification Order granting GSC's request to lift the restrictions on use of the Leavenworth Supply Line demonstrates that in ordered paragraph number 1 the word "areas" is used as a noun and not used as an adjective to modify the word "certificated," i.e. the order does not make any reference to "area certificates" or to any other specific type of certificates when it uses the word "certificated."

53. The Commission's 1956 Modification Order granting GSC's request did not state that it authorized the full use of the Leavenworth Supply Line for only those sections in which it had previously granted GSC an area certificate. It states that it authorizes full use in areas heretofore certificated. The order changes the use of the supply line, an expansion of its use, near or beyond the Mid-Continent International Airport, in any of the applicant's service areas in which a certificate was granted in Case No. 12,632, without distinction as to the type of certificate.

54. The Commission's 1956 Modification Order granting GSC's request had the effect of lifting all restrictions on the Leavenworth Supply Line's use in all sections where GSC had been granted a service area CCN, near and beyond the MCI Airport, i.e. all of the sections identified in Finding of Fact Number 36.

55. The Commission's 1956 Modification Order granting GSC's request had the effect of converting the line certificate for the

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[76] See Findings of Fact Numbers 42-49, and their associated footnotes.

Leavenworth Supply Line, where it traversed Sections 7, 8 and portions of 9, in T52N, R34W, into an area certificate. GSC had, in fact, already been granted an area certificate for these sections. However, prior to the 1956 Order, the gas supply for serving customers in these three sections, with the exception of the part of Section 9 included in the MCI Airport area, was restricted to a source other than the Leavenworth Supply Line. Once the restriction was lifted, GSC was free to serve customers in these sections directly from any connection made to the Leavenworth Supply Line.

56. The Commission's 1956 Modification Order granting GSC's request had the effect of converting GSC's line certificate for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W, into an area certificate because it authorized the **full and unrestricted use** of the Leavenworth Supply Line in all areas where GSC had **"heretofore been certificated,"** (i.e. "any certificate," "all certificates" or "every certificate"), near and beyond the MCI Airport, **regardless of the type of certificate previously issued by the Commission**. (Emphasis added.)[77]

Findings of Fact Regarding MGE's 1997 Commission-Approved Tariff

57. As an ancillary matter in Case Number GA-96-130, after MGE acquired the service area of GSC in Commission Case Number GM-94-40, the Commission determined that the extent and boundaries of MGE's service area were "ill-defined" and ordered MGE and the Commission's Staff "to cooperate in preparing and filing a tariff setting out the plat and legal description of the current and complete MGE service area, and canceling all prior certificates."[78]

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[77] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency. Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. *Beaufort Transfer Co.*, 610 S.W.2d at 100; *Missouri Pacific Freight*, 312 S.W.2d at 368; *Orscheln Bros. Truck Lines*, 110 S.W.2d 366.

[78] MGE Exh.1, Noack Direct, p. 3 lines 1-18. See also, Report and Order, *In the Matter of the Application of Missouri Pipeline Company for Permission, Approval, and a Certificate of Public Convenience and Necessity Authorizing It to Modify and to Construct, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Pipeline, a Delivery Spur, Delivery Stations and Related Interconnections and Other Facilities and to Transport natural Gas in Portions of Cass and Jackson Counties, Missouri*, Case No. GA-96-130; *In the Matter of the Joint Application of Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, a Kansas Corporation and Southern Union Company, d/b/a*

58. In Case No. GR-96-285, the Commission noted: "MGE has committed to file tariff sheets with metes and bounds descriptions and maps showing certificated service areas in the State of Missouri by February 28, 1997. This commitment by MGE adequately addresses Staff's concern on this issue. The Commission finds that this issue is resolved by virtue of MGE's commitment to file the requested tariff sheets by February 28, 1996."[79]

59. In response to the Commission's directive, MGE worked with the Commission's Staff for approximately three months to revise and update its tariff to accurately reflect its certificated service areas in Missouri.[80]

60. In order to comply with the Commission's order to update its tariff listing of MGE's certificated service areas MGE personnel spent "at least 200 hours pulling data, looking at facilities, generating facilities maps, comparing the order of the facilities maps, deriving the tariff sheets, working with Mr. McDuffey (Staff) to explain all the materials, at least once at our offices, perhaps twice."[81]

61. MGE witness Robert Hack, currently serving as MGE's Chief Operating Officer, testified that in order to prepare the tariff sheets, MGE and Staff examined the Commission's certificate, merger and acquisition orders. MGE and Staff then prepared maps based upon these orders and a review of MGE's facility to identify all of the township, range and section number encompassing MGE's certificated service area.[82]

62. Mr. Hack testified that he prepared the 1997 tariff sheets that resulted from MGE's and Staff's collaboration to accurately identify its certificated service areas.[83]

63. Mr. Hack was serving in the capacity of MGE's Senior Attorney in 1997.[84]

Missouri Gas Energy, a Delaware Corporation, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets Relating to the Provision of Gas Service in Missouri from Western Resources, Inc. to Southern Union Company, and in Connection Therewith, Certain Other Related Transactions, Case No. GM-94-40.

[79] Report and Order, *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Service Area*, Case No. GR-95-285. MGE Exh. 1, Noack Direct, p. 3 lines 1-18; Staff Exh. 20, Straub Rebuttal, p. 2, lines 17-25, p. 3, lines 1-2.

[80] Transcript p. 137, lines 15-25, p. 138, lines 1-25, p. 139, lines 1-21.

[81] *Id*.

[82] Transcript p. 116, lines 1-5.

[83] Transcript p. 116, lines 6-25, p. 117, lines 1-9.

64. The tariff filing resulting from MGE and Staff's collaboration, which included MGE's Index of Certificated Areas for Platte County, was filed on February 20, 1997, bore an issue date of February 21, 1997, and bore an effective date of April 21, 1997.[85]

65. On April 10, 1997, MGE filed a letter with the Commission requesting that the effective date for the above referenced tariff sheets be extended until May 21, 1997.[86]

66. MGE's tariff filing, in response to the Commission's directive for it to clarify the geographical boundaries of its service area in Case No. GA-96-130 and GR-96-285, included the following Tariff Sheets:[87]

P.S.C. Mo. No. 1

1st Revised Sheet No. 6, Canceling Original Sheet No. 6
Original Sheet No. 6.1 through Original Sheet No. 6.16

67. MGE's tariff filing included a total of 17 sheets describing MGE's service areas in Andrew, Audrain, Barry, Barton, Buchanan, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, DeKalb, Greene, Henry, Howard, Jackson, Jasper, Johnson, LaFayette, Lawrence, McDonald, Moniteau, Newton, Pettis, Platte, Ray, Saline, Stone, and Vernon Counties in Missouri.[88]

68. MGE's tariff sheets, as referenced above, all bore the title line of "Index of Certificated Areas," and all bore the caption of "Missouri Gas Energy, a Division of Southern Union Company, For: All Missouri Service Areas."[89]

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[84] Transcript p. 69, lines 1-4, Staff Exh. 12.
[85] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; tariff tracking number JG-2003-0638; MGE Exh.1, Noack Direct, p. 3 lines 1-18. Staff Exh. 3.
[86] Staff Exh. 11; Transcript p. 77, lines 17-23.
[87] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17, and Schedule 2 to the Exhibit, pp. 6, 7 and 23; Staff Exh. 10; Staff Exh. 21, Straub Surrebuttal, p. 2, lines 1-12.
[88] Staff Exhibit 10; P.S.C. MO. No. 1, Tariff Tracking Number JG-2003-0638
[89] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

69. Tariff Sheet No. 6.15, one of the original sheets included in MGE's February 20, 1997 tariff filing, lists MGE's certificated areas for Pettis and Platte Counties, Missouri.[90]

70. MGE's Original Sheet 6.15 lists the following sections of Platte County as being part of its certificated area:

Platte County

T50N, R33W	Sections	4, 5, 6, 7, 8, 9
T51N, R33W	Sections	4, 5, 6, 7, 8, 9, 16,17,18,19, 20, 21, 28, 29, 30, 31, 32, 33
T51N, R34W	Sections	1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
T51N, R35W	Sections	11, 12
T52N, R33W	Sections	**4, 5,** 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, 33
T52N, R34W	Sections	**1, 2, 3, 4, 5, 6,** 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
T52N, R35W	Sections	**1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12**
T52N, R36W	Sections	**1, 12**
T54N, R33W	Sections	4, 5, 6, 7, 8, 9, 16,17,18,19, 20, 21, 28
T54N, R34W	Sections	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33
T54N, R35W	Sections	1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
T55N, R34W	Section	31
T55N, R35W	Sections	32, 33, 34, 35, 36[91]

[90] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

(Emphasis placed on the sections in dispute.)

71. MGE's Original Sheet No. 6.15, listing MGE's certificated areas for Platte County, Missouri, includes the 22 disputed sections in this matter that were delineated in Finding of Fact Number 18, which include the 9 sections that allegedly overlap with Empire's certificated area, i.e. Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W and Sections 4, 5 and 6 in T52N, R34W.[92]

72. There are no distinctions of any type on Original Sheet No. 6.15 identifying the specific types of CCNs that were granted by the Commission to MGE, or its predecessor in interest GSC, for each of the sections listed as part of MGE's certificated areas.[93]

73. There is no documentation of any type accompanying Original Sheet No. 6.15 that differentiates between sections where MGE, or its predecessor in interest GSC, was granted a "transport," "line" or "area" certificate, or any combination of these types of certificates.[94]

74. Michael W. Straub, employed by the Commission as the Assistant Manager-Rates in the Energy Department of the Operations Division between May 1995 and August 2000, supervised the person assigned to review MGE's tariff filing when it was filed in 1997.[95]

75. Witness Straub testified that he could only remember two things about this particular 1997 tariff filing by MGE, wanting to get the tariffs clarified and writing an annotation on the tariff routing slip.[96]

76. MGE witness Robert Hack testified that the Staff person he remembered most for working with him on developing the new tariff sheets was Mr. Mack McDuffey.[97]

77. Mr. Hack, while serving as MGE's Senior Attorney, filed a letter with the Commission on April 11, 1997, in response to a request from Mr. McDuffey to provide a list of Commission orders used by MGE while working on the creation of the new tariff sheets.[98]

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[91] *Id*.
[92] MGE Exh.1, Noack Direct, attached Exhibit A; MGE Exh. 2, Noack Rebuttal, p. 3 lines 12-22, p. 4, lines 1-5; Staff Exhibit 13.
[93] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638.
[94] MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.
[95] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17.
[96] Transcript p. 273, lines 1-17.
[97] Transcript p. 69, lines 5-8. Mr. McDuffey was not a witness in this matter.
[98] Staff Exh. 12; Transcript p. 77, lines 24-25, p. 78, lines 1-19.

78. The list was comprised of approximately 80 cases including the Commission's May 24, 1955 order in consolidated cases numbered 12,632 and 12,674.[99]

79. Witness Straub testified that Staff's investigation of MGE's new tariff sheets included review of Commission orders issued dating from November 22, 1935 through April 18, 1995, a total of approximately 80 MGE CCN and service order cases.[100]

80. The time period referenced by Mr. Straub matches the dates on the list of orders submitted by Mr. Hack to Mack McDuffey on April 11, 1997.

81. From the approximately 80 cases reviewed, Staff determined that MGE had facilities in 31 counties, 101 townships, 245 ranges, and 2,901 sections.[101]

82. Many of the Commission orders that were reviewed were over 50 years old at the time of their review.[102]

83. After Staff's review, the tariff sheets, including Original Sheet No. 6.15, were routed to the Commissioners for a vote of approval or suspension with the Utility Operations Division Routing Slip, File No. 9700571.[103]

84. The Utility Operations Division Routing Slip, File No. 9700571 was circulated to five Staff members to review and initial prior to submission to the Commissioners. Those five members were Mr. McDuffey, Mr. Straub, Mr. Matisziw, Mr. Goldammer, and "Legal." There are four sets of initials correspond to the name listings with Mr. Straub being listed as "absent." Mr. McDuffey initialed twice indicating a revision had been made on May 9, 1997.[104]

85. Staff's recommendation on the routing slip was to approve the tariffs, or to allow them to go into effect by operation of law.[105]

86. Staff's recommendation on the routing slip states, in pertinent part:

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[99] Staff Exh. 12. "It is worth noting that the Commission December 1956 Modification Order for Case No. 12,632 was not included on this list."

[100] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17; Staff Exh. 12.

[101] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17; Staff Exh. 12;Transcript p. 270, lines 11-18.

[102] Transcript p. 84, lines 24-25, p. 85, line 1; Staff Exh. 12.

[103] Staff Exh. 13.

[104] *Id*.

[105] MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

> The Commission Rule 4 CSR 240-2.060 (Rule) requires metes and bounds description of the certificated service area . . .
>
> Staff and Company have reviewed certificates of convenience and necessity (CCN) cases and Company service orders in the development of the proposed tariffs sheets. The CCN cases were granted in either a transmission or service area certificate making development of a service area in a metes and bounds format very difficult. Therefore, the description of the Company's proposed service area was developed by listing the service areas by township, range and section. The township, range and section format is utilized by other regulated energy utilities under the jurisdiction of the Commission. In Staff's opinion a township, range and section format satisfies the Rule. Therefore, Staff has no objection to this format.[106]

87. The Commission's Utility Operations Division Routing Slip, File No. 9700571, bearing an Agenda Date of May 14, 1997, establishes that three of the acting Commissioners reviewed MGE's February 1997 tariff filings; Chair Zobrist, Vice Chair Drainer, and Commissioner Crumpton.[107]

88. These same three Commissioners initialed the routing slip and indicated that the Commission's action was to approve the tariff filing. A separate hand-written notation on the routing slip indicates that the Commission's vote was "3-0".[108]

89. Mr. Straub was present at the Commission's Agenda meeting on May 14, 1997, when the Commission made its decision on approving Original Sheet No. 6.15.[109]

90. Mr. Straub testified that he added a hand written note to the Division Routing Slip of File No. 9700571, MGE's updated tariff filing. The hand-written addition reads as follows: "The purpose of this filing is

[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17.

to show the Company's current service area, and does not expand to any area that it currently does not serve."[110]

91. There is no competent or substantial evidence in the record that would establish that Mr. Straub's hand-written addition to the Division Routing Slip of File No. 9700571 constituted official action by the Commission that was voted upon by the Commissioners in attendance at the May 14, 1997 Agenda meeting.[111]

92. MGE's Original Sheet No. 6.15 has not been revised since its original submission and approval in 1997.[112]

93. Once a tariff becomes effective a company must comply with the tariff.[113]

94. Failure to comply with a tariff could result in, among other things, the Staff filing a complaint action against the company.[114]

95. If there is an error in a tariff that has been approved by the Commission, the tariff remains in effect unless the tariff is modified by the appropriate procedure.[115]

96. Any alleged discrepancy or error in a Commission-approved tariff can be brought to the attention of the Commission by any interested party.[116]

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[110] Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17 and Schedule 2 to the Exhibit, pp. 1-2; Staff Exh. 13. Transcript p. 253, lines 5-25, pp. 254-259, p. 260, lines 1-18.

[111] The Commission appropriately sustained a hearsay objection to Mr. Straub's testimony concerning whom he claimed had instructed him to add this notation. The statement that he was instructed to add this notation was admitted into evidence solely for the limited purpose of establishing that Mr. Straub believed he had a reason for adding his hand-written statement to the routing slip, not for the purpose of the truth of the matter that he was in fact instructed to do so. There was no 1997 member of the Commission present at the evidentiary hearing that could have corroborated Mr. Straub's statement, or been subject to cross-examination of the parties regarding the statement. There simply is no competent evidence in the record to establish who, if anyone, gave Mr. Straub the directive to add his hand written note to the Division Routing Slip File No. 9700571. See Footnote Number 8 – hearsay evidence not competent or substantial.

[112] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, p. 3 lines 1-18 and attached Exhibit A. See also Staff Exhs. 10-13.

[113] Transcript p. 261, lines 16-25. See also Conclusions of Law, Legal Effect of a Commission-Approved Tariff.

[114] *Id*.

[115] Transcript p. 262, lines 3-25, p. 263, lines 1-25, p. 264, lines 1-2, p. 265, lines 7-13, p. 269, lines 17-23, p. 274, lines 16-23, p. 277, lines 4-13.

[116] *Id*.; Sections 386.390, 386.400, 386.420, RSMo 2000; Commission Rule 4 CSR 240-2.070.

97. Any alleged discrepancy or error in a Commission-approved tariff can be corrected voluntarily on the part of the company by filing a corrected tariff.[117]

98. Any alleged discrepancy or error in a Commission-approved tariff can be corrected by an interested party filing a complaint action with the Commission challenging the lawfulness of the order approving the tariff.[118]

99. MGE's Tariff Sheet 6.15, as filed and approved, is still in effect in the form in which was approved on May 14, 1997.[119]

100. There is no competent and substantial evidence in the record to establish that any proper party intervened and requested MGE's Tariff Sheet 6.15 should have been suspended or challenged the filing of the Tariff in any way.

101. Lacking interveners, there was no proper party, or properly contested case before the Commission whereby an intervening entity could appeal the Commission's order approving MGE's Tariff Sheet 6.15 in a court of competent jurisdiction.[120]

102. To date, no interested party has filed a complaint action with the Commission challenging the lawfulness of its May 14, 1997 order approving MGE's Tariff Sheet 6.15.[121]

103. To date, MGE has not voluntarily filed a new tariff with the Commission to provide any identified corrections to its Commission-approved Tariff Sheet 6.15.[122]

104. At the evidentiary hearing, MGE offered to voluntarily correct its Commission-Approved Tariff Sheet 6.15 to remove Sections 1, 2 and 3 of T52N, R35W and Sections 4, 5 and 6 of T52N, R34W from its Index of Certificated Areas.[123]

105. In its Post-Hearing Brief, MGE represented to the Commission that it would voluntarily correct its Commission-Approved

[117] Transcript p. 262, lines 8-25, p. 263, lines 1-3, p. 269, lines 8-14.
[118] See Footnotes 113-117.
[119] Transcript p. 263, line 25, p. 264, lines 1-2.
[120] Sections 386.500, 386.510, 386.515, 386.520, 386.530, and 386.540, RSMo 2000.
[121] Transcript p. 269, lines 24-25, p. 270, lines 1-3. The Commission takes notice that there have been no filings by any of the parties to this action, other than the immediate case, addressing whether the Commission's order approving MGE's 1997 Tariff was in error or in any way, unlawful.
[122] P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638.
[123] Transcript p. 97, lines 23-25, p. 98, lines 1-5, p. 119, lines 14-25, p. 120, lines 1-2; MGE Exh. 3, Noack Surrebuttal, p. 4, lines 18-22, p. 5, lines 1-10.

Tariff Sheet 6.15 to remove Sections 4 and 5 in T52N, R33W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, Sections 1, 2, 3, 4, 5, 6, 7, 8, and 9 of T52N, R35W, Sections 1 and 12, of T52N, R36W, if the Commission should find that MGE lacks a Commission-approved CCN for these sections.[124]

Findings of Fact Concerning MGE's Expansion into the Disputed Sections

106. The developers of "Seven Bridges" contacted MGE about providing natural gas service to their subdivision and executed a contract with MGE for the provision of that service on January 6, 2006.[125]

107. Seven Bridges is a large planned residential subdivision, comprised of approximately 1,500 new homes to be constructed in several phases in Sections 11, 12, 13 and 14 of T52N, R35W.[126]

108. MGE received a construction advance from the developer of Seven Bridges to cover the cost of the extension of its gas facilities to phases one through four of the subdivision.[127]

109. MGE began construction of the extension facilities immediately after the contract was signed and began providing service to customers in the first phase of the "Seven Bridges" subdivision (Section 12) in early 2006.[128]

110. This construction included the placement of main extensions from its twelve inch supply line, the "Leavenworth Line," to serve the portion of the Seven Bridges development in Sections 13 and 14.[129]

111. In order to serve the Seven Bridges development, MGE began construction in Sections 13 and 14 in T52N, R35W, where they border Sections 11 and 12 in T52N, R35W, prior to MGE discovering

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[124] MGE's Post-Hearing Brief, Part IV, Case Number GA-2007-0289, filed December 21, 2007.

[125] MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript p. 92, lines 15-20.

[126] Transcript p. 122, lines 18-24; MGE Exh. 1, Noack Direct, p. 4, lines 8-17; MGE Exh. 2, Noack Rebuttal, p. 5 lines 11-15. MGE's Application further stated that the expansion of its services would involve two commercial buildings. MGE's Application, p. 2, paragraph 5. See also Empire Exh. 3, Gatz Direct, p. 6, lines 22-23.

[127] MGE Exh.1, Noack Direct, p. 5, lines 6-9.

[128] MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript, p. 150, lines 21-25.

[129] MGE Exh. 2, Noack Rebuttal, p. 7 lines 10-12. The Leavenworth Line was constructed to serve the Kansas City International Airport and the adjacent area. MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 133, lines 18-25, p. 134, lines 1-25, p. 135, line 1.

these sections were not in an area approved by the Commission as MGE's service territory.[130]

112. MGE filed its application for a CCN to provide service in Sections 13 and 14 in T52N, R35W as soon as it became apparent that its construction activities had taken place in an area not approved for service by the Commission.[131]

Findings of Fact Regarding MGE's Provision of Service in the Disputed Sections

113. MGE, or its predecessor in interest, has been serving at least one customer in Section 12 in T52N, R35W since 1960.[132]

114. MGE has been servicing two customers in Section 10 in T52N, R35W since 1992.[133]

115. MGE has been servicing existing customers and a new customer in Sections 10 and 12 since the Commission approved its tariff in May of 1997.[134]

116. In May and October of 2006, MGE began serving customers in the Seven Bridges development and one other customer in Section 12, pursuant to its tariff.[135]

117. MGE currently serves residential customers in subdivisions located directly to the north (Sections 10, 11 and 12) and east (Sections 7 and 18) of Sections 13 and 14. MGE, if granted a certificate, will use the same supply line that serves these customers to provide service to Sections 13 and 14.[136]

118. MGE serves customers on Oakmont Drive, beginning in a subdivision in Section 7, T52N, R34W for which it has a CCN to serve customers. Oakmont Drive now extends into the southeast corner of Section 12 in T52N, R35W just east of Prairie Creek.[137]

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[130] MGE Exh. 2, Noack Rebuttal, p. 2 lines 20-23, p. 3, lines 1-2, p. 5 lines 11-24; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

[131] MGE Exh. 2, Noack Rebuttal, p. 2 lines 22-23, p. 3, lines 1-2; Transcript p. 123, lines 7-11, p. 133, lines 18-25, p. 134, lines 1-25, p. 135, line 1.

[132] MGE Exh.1, Noack Direct, p. 3 lines 1-18; MGE Exh. 2, Noack Rebuttal, p. 5 lines 1-2; Transcript p. 128, lines 2-9.

[133] *Id.*; MGE Exh. 2, Noack Rebuttal, p. 5 lines 2-3; Transcript p. 100, lines 3-11.

[134] *Id.*; MGE Exh. 2, Noack Rebuttal, p. 5 lines 3-5; Transcript p. 84, lines 9-12.

[135] MGE Exh. 2, Noack Rebuttal, p. 5 lines 5-7; MGE Exh. 3, Noack Surrebuttal, p. 2 lines 2-4; Transcript p. 93, lines 14-17, p. 114, lines 14-23, p. 128, lines 14-19, p. 130, lines 12-15.

[136] MGE Exh.1, Noack Direct, p. 3 lines 1-18, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 95, lines 18-23, p. 100, lines 3-11, p. 114, lines 5-11, p. 126, lines 5-24.

[137] Staff Exh.18, Warren Rebuttal, p. 5, lines 1-5.

119. MGE is serving approximately 40 customers in Section 12, T52N, R35W and 10 to 20 customers in Sections 10 and 11, T52N, R35W.[138] A handful of these customers are served directly off of the Leavenworth Supply Line.[139]

120. None of the customers that MGE serves in Sections 10, 11, and 12 of T52N, R35W, are located in Platte City or are located in areas that require a franchise agreement with any municipality.[140]

Findings of Fact Regarding MGE's Ability to Provide Natural Gas Service in the Disputed Sections

121. MGE has an adequate supply of gas and adequate pipeline transportation capacity to serve customers in Sections 13 and 14, T52N, R35W.[141]

122. MGE has provided the Commission with a schedule outlining the estimated construction costs, advances by the developers and estimated margin to be received from the future customers using natural gas. Based upon this schedule, MGE will profit from serving the new customers.[142]

123. MGE is currently providing natural gas service in Missouri and has the expertise, experience and financial qualifications to provide natural gas service in Sections 13 and 14.[143]

124. MGE is already serving a portion of the Seven Bridges development and allowing it serve the entire development would prevent the duplication of services.[144]

125. MGE is willing to enter a franchise agreement with Platte City to serve any customers that are within its city limits.[145]

Findings of Fact Regarding Empire's CCNs and Tariffs

126. On January 12, 1956, in Case Number 13,172, the Commission authorized the Missouri Public Service Company to construct, operate and maintain a natural gas transmission and distribution system in Sections 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35

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[138] Transcript p. 95, lines 21-23, p. 100, lines 3-11, p. 114, lines 3-11, p. 126, lines 5-24, p. 131, lines 4-13.
[139] Transcript p. 126, lines 17-21, p. 128, lines 3-13.
[140] Transcript p. 115, lines 8-19, Staff Exh. 4.
[141] MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3.
[142] MGE Exh.1, Noack Direct, p. 5, lines 15-18.
[143] MGE Exh.1, Noack Direct, p. 5, lines 22-24, p. 6, lines 1-3.
[144] *Id*.
[145] MGE Exh. 3, Noack Surrebuttal, p. 3, lines 14-15.

and 36 in T53N, R35W; **Sections 1, 2, 3, 10, 11, and 12 in T52N, R35W**; Sections 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32 and 33 in T53N, R34W; and **Sections 4, 5 and 6 in T52N, R34W** of Platte County, Missouri. **(The sections emphasized in bold are the sections appearing in both MGE's and Empire's current tariffs.)**[146]

127. At the time Missouri Public Service Company was granted this certificate, GSC's over-lapping certificate for Sections 10, 11, and 12 in T52N, R35W was a line certificate.[147]

128. The CCN conveyed to Missouri Public Service Company ("MPSC") was subsequently transferred to Aquila, Inc. successor in interest to MPSC.[148]

129. In Case Number GO-2006-0205, the Commission approved a Unanimous Stipulation and Agreement executed between Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks -- L&P ("Aquila") and Empire transferring all of Aquila's Missouri jurisdictional natural gas utility operations; effective May 2, 2006.[149]

130. In the order approving the Unanimous Stipulation and Agreement (Case Number GO-2006-0205), the Commission authorized Empire to adopt Aquila's tariff sheets and authorized Empire to provide natural gas service in the areas that were being served by Aquila in accordance with those tariff sheets.[150]

131. On June 15, 2006, the Commission approved the tariff sheet filed by Empire, P.S.C. Mo. No. 1, Sec. A, Original Sheet No, 1;

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[146] *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in and Area Adjacent to Platte City and Tracy, Platte county, Missouri, as Shown on the Attached Map Marked Exhibit A*, Case Number 13,172 (unreported). See also Empire Exh. 4, Gatz Rebuttal, p. 4, lines 1-6 and Staff Exh. 2. As previously noted, when interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency. *Beaufort Transfer Co.*, 610 S.W.2d at 100; *Missouri Pacific Freight Transport Co.*, 312 S.W.2d at 368; *Orscheln Bros. Truck Lines*, 110 S.W.2d at 366.

[147] See Findings of Fact Numbers 19-56 and their associated footnotes.

[148] Empire Exh. 3, Gatz Direct, p. 10, lines 4-20; MGE Exh. 2, Noack Rebuttal, p. 3, lines 21-22, p. 4, line 1.

[149] *In the Matter of the Joint Application of Aquila, Inc. d/b/a Aquila Networks – MPS and Aquila Networks -- L&P ("Aquila"), The Empire District Gas Company ("EDG"), and The Empire District Electric Company ("EDG") for an Order Authorizing the Sale, Transfer, and Assignment of Certain Assets and Liabilities from Aquila to EDG and in Connection Therewith, Certain Other Related Transactions*, Case Number GO-2006-0205, Order Approving Unanimous Stipulation and Agreement and Granting a Certificate of Public Convenience and Necessity, issued April 18, 2006, effective May 1, 2006.

[150] *Id*.

Empire's adoption notice of Aquila's tariff, tariff tracking number YG-2006-0896, effective June 20, 2006.[151]

132. Aquila's tariff, as adopted by Empire, P.S.C. MO. No. 1, Sheet No. 3 identifies the following Sections of Platte County as being part of its authorized gas service territory:

a.) Sections 4-6 of T52N, R34W;

b.) Sections 1-3, and 10-12 of T52N, R35W;

c.) Sections 16-21 and 28-33 of T53N, R34W;

d.) Sections 6, 7, 13-15, 18, 19, 22-27 and 34-36 of T53N, R35W; and,

e.) Sections 1-3, 10-15 and 22-24 of T53N, R36W.[152]

Findings of Fact Concerning Empire's Provision of Service in the Disputed Sections

133. Empire holds a franchise from Platte City, in Platte County, Missouri, to provide gas service within Platte City.[153]

134. The community of Platte City has been part of Empire's, or its predecessor's, authorized service area for over 50 years.[154]

135. Empire also has an order from the County Court of Platte County to construct, operate, and maintain pipelines for transmission of gas along, across, or under the roads, highways and public ways of Platte County, Missouri.[155]

136. Platte City and Kansas City have an annexation agreement which creates the potential for areas inside the Platte City planning area that are certificated to MGE becoming annexed.[156]

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[151] *Id*. Order Recognizing Adoption of Tariffs in Compliance with Commission Order, Issue date, June 15, 2006, Effective Date, June 20, 2006.

[152] P.S.C. MO. No. 1, Original Sheet No. 3, Date of Issue: April 27, 2004; Effective Date: May 1, 2004; tariff tracking number YG-2006-0896.

[153] Empire Exh. 3, Gatz Direct, p. 4, lines 18-19; Empire Exh. 1, Klein Direct, p. 6, line 7; Staff Exh.18, Warren Rebuttal, p. 5, lines 20-23.

[154] Empire Exh. 3, Gatz Direct, p. 4, lines 12-14.

[155] Empire Exh. 3, Gatz Direct, p. 4, lines 19-22.

[156] Staff Exh.18, Warren Rebuttal, p. 6, lines 1-13; Staff Exh. 4.

137. Empire believes that the service territory at issue in this case will eventually be annexed into Platte City, and based upon its current franchise and court authority, that it should be granted a CCN to provide service in Sections 13 and 14, T52N, R35W, and the surrounding Sections 15, 22, 23, and 24.[157]

138. Of the nine disputed sections, where Empire and MGE both have Commission-approved tariffs listing them as part of their respective service areas (i.e. Sections 4, 5 and 6 of T52N, R34W and Section 1, 2, 3, 10, 11, and 12 of T52N, R35W) only portions of Section 1 in T52N, R35W and Sections 5 and 6 in T52N, R34W are encompassed within Platte City's boundaries.[158]

139. Empire, or its predecessor Aquila, has provided gas service to at least one customer in Section 12 of T52N, R35W since October of 1995.[159]

140. Empire is currently serving 3 residential customers and no commercial customers in Section 12 of T52N, R35W. [160]

141. Empire has installed main to serve customers in the in the Copper Ridge Subdivision located in Section 12 of T52N, R35W, but there are no active customers in this subdivision at this time.[161]

142. Copper Ridge is a two-phase subdivision expected to have approximately 70 homes when it is completed.[162]

143. Empire serves no customers in Sections 2, 3, 10, and 11 in T52N, R35W, and no customers in Section 4 and 5 of T52N, R34W.[163]

144. Empire serves 163 residential customers in Section 1 in T52N, R35W.[164]

145. Empire serves 680 residential customers and 51 commercial customers in Section 6 of T52N, R34W.[165]

Findings of Fact Regarding Empire's Ability to Provide Natural Gas Service in Sections 13, 14, 15, 22, 23, and 24 of T52N, R35W

[157] Empire Exh. 3, Gatz Direct, p. 4, lines 14-18, p. 6, lines 1-23, p. 7, lines 1-3; Staff Exh. 4.
[158] Staff Exh. 17, Warren Direct, p. 3, lines 14-20; Staff Exh. 4.
[159] Empire Exh. 2, Teter Direct, p. 5, lines 18-20. Transcript p. 179, lines 21-25.
[160] Staff Exh.18, Warren Rebuttal, p. 4, lines 19-21. Transcript p. 158, lines 4-14, p. 180, lines 6-9.
[161] *Id*.
[162] Transcript p. 179, lines 17-20.
[163] Transcript p. 179, lines 12-16, p 180, lines 22-25, p. 181, lines 1-25, p. 182, lines
[164] Transcript p. 180, lines 22-25, p. 181, lines 1-25, p. 182, lines 1-2.
[165] *Id*.

146. Empire's existing natural gas distribution system in the Platte City area is comprised of approximately 47 miles of coated and wrapped steel and polyethylene main serving approximately 2,800 customers in Platte City, Weston and Tracy in Platte County, Missouri.[166]

147. The natural gas utilized to serve Empire's customers in the Platte City area is delivered into Empire's distribution system through Southern Star Central Gas Pipeline's transmission network.[167]

148. Empire has the necessary interstate pipeline transportation capacity to serve the anticipated growth in the Seven Bridges in Sections 11-14 in T52N, R35W via an existing transportation agreement it has with the Southern Star Central Pipeline Company.[168]

149. Empire has expanded its system in Section 12 and built loop segments to support future growth projected for Sections 13 and 14, T52N, R35W, and the surrounding Sections 15, 22, 23, and 24.[169]

150. Empire will use internally generated funds to expand its existing natural gas delivery system to adequately serve the expected increase in demand for natural gas service.[170]

151. Empire expects its investment in the new service area to grow to $331,000 by the end of the third year of service; $166,000 of this cost being for main installation and $165,000 being for service installation.[171]

152. Empire's projected investment in new service area, described in Findings of Fact Numbers 148-151, *supra*, does not include the investment necessary to serve the existing customers in Sections 12, 13 and 14, T52N, R35W, that are currently receiving service from MGE.[172]

153. The exact system modifications necessary for Empire to accommodate all of the future growth in the six additional sections sought in which Empire seeks a CCN (i.e. Sections 13, 14, 15, 22, 23, and 24, T52N, R35W) have not been determined.[173]

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[166] Empire Exh. 1, Klein Direct, p. 2, lines 11-14. See also Staff Exh. 4 Platte City Annexation Plan Map.

[167] Empire Exh. 1, Klein Direct, p. 2, lines 18-20.

[168] Empire Exh. 3, Gatz Direct, p. 7, lines 6-8; Empire Exh. 1, Klein Direct, p. 3, lines 21-23.

[169] Empire Exh. 1, Klein Direct, p. 3, lines 5-8.

[170] Empire Exh. 3, Gatz Direct, p. 7, lines 8-21; Empire Exh. 1, Klein Direct, p. 4, lines 20-22; Transcripts p. 216, lines 16-23.

[171] Empire Exh. 1, Klein Direct, p. 5, lines 22-23.

[172] Empire Exh. 1, Klein Direct, p. 6, lines 1-5.

[173] Empire Exh. 1, Klein Direct, p. 3, lines 11-13.

154. Empire could use the facilities that MGE uses to serve its existing customers in Sections 12, 13 and 14, T52N, R35W, if the Commission were to order MGE to abandon or sell those facilities to Empire.[174] However, even if this was possible, Empire would still have to extend a 4-inch main one-half mile from its current facilities, over the LSL, to the entrance of Seven Bridges in order to supply gas to Seven Bridges at a cost of $26,400 to $39,600.[175]

155. Empire could use MGE's facilities located in the disputed sections to serve customers if the Commission directed MGE to sell those facilities to Empire.[176]

156. Empire would have to exchange meters for those customers currently being served by MGE if the Commission directed MGE to sell those facilities to Empire, a 30-minutes process involving shutting off the gas, exchanging meters, and relighting the service.[177]

157. Empire expects that for every one-hundred new homes in the proposed developments in Sections 13 and 14, T52N, R35W, approximately nine-thousand five-hundred (9,500) feet of main will be required to serve them.[178]

158. Empire's dollar cost for each lineal foot of 4-inch main is $10 to $15.[179]

159. Empire's dollar cost for 9,500 feet of main to serve 100 new customers would be between $95,000 and $142,000.[180]

160. Empire's dollar cost for 9,500 feet of main to serve 100 established customers would be the same, between $95,000 and $142,000, plus the cost of service.[181]

161. Empire's cost of main to serve the first 100 existing customers, if Empire is unable to use MGE's current facilities, is approximately $78,000.[182]

162. For each additional 100 customers the cost of main would be approximately $44,000, if Empire is unable to use MGE's current facilities.[183]

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[174] Transcript, p. 155, lines 18-25, p. 156, lines 1-25, p. 157, lines 1-7.
[175] Transcript p. 158, lines 20-25, p. 159, lines 2-8; See Finding of Fact Number 158.
[176] Transcript p. 156, lines 2-22.
[177] Transcript p. 157, lines 1-7, p. 158, lines 1-25, p. 159, lines 1-25, p. 160, lines 1-19.
[178] Empire Exh. 1, Klein Direct, p. 5, lines 12-14, Transcript p. 161, lines 22-25.
[179] Transcript p. 160, lines 11-14.
[180] Transcript p. 160, lines 11-14, p. 161, lines 22-25.
[181] Transcript p. 162, lines 1-3.
[182] Transcript pp. 160-165.
[183] *Id*.

163. In addition to the main installation, a service line and regulator will have to be installed at each customer's home.[184]

164. Empire's service installation generally costs $550 per customer. To provide service installation to the approximately 40 to 60 customers that MGE is currently serving in Seven Bridges, this cost would total between $22,000 and $33,000.[185]

165. In addition to installing main to connect to MGE's current facilities, assuming MGE's existing facilities can be used, and in addition to installing main for new customers, Empire would eventually have to install "looping facilities" to provide a secondary flow for consistency of service. The looping facilities cost the same as any other main installation.[186]

166. The projected extension of Empire's gas distribution facilities into the new service territory sought in this case meets the economic thresholds of Empire's line extension policy, i.e. the extensions will generate sufficient revenue to justify constructing and operating the new facilities.[187]

167. Customers receiving natural gas service from Empire are charged higher rates than MGE's customers. Based upon rates between June 2006 and June 2007, a MGE customer using 860 CCF of natural gas would pay $1023.64 for that gas, while an Empire customer would pay $1,161.33 for the same amount of natural gas. Empire's charges are 13% higher than MGE's. Empire does has a lower monthly customer charge than MGE, so customers using less natural gas in the heating season would have less of an increase, but it would cost more for customers to receive natural gas service from Empire.[188]

Findings of Fact in Relation to Granting Empire's Request for a CCN in Sections 15, 22, 23, and 24 of T35N, R35W

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[184] Empire Exh. 1, Klein Direct, p. 5, lines 14-16.

[185] Transcript p. 162, lines 3-10.

[186] Transcript p. 163, lines 3-25, p. 164, lines 1-18. See Findings of Fact 154, 157-162.

[187] Empire Exh. 1, Klein Direct, p. 4, lines 16-19.

[188] Staff Exh. 19 Warren Surrebuttal, p. 7, lines 13-23, p. 8, lines 1-7; Transcript p. 242, lines 10-25, p. 243, lines 1-7. p. 244, lines 13-25, p. 245, lines 1-22, p. 250, lines 4-21. Without providing an actual cost translation, Witness Warren testified that Empire's recent submission of a reduced PGA factor could possibly lower Empire's rates. However, when asked the same questions about MGE's recent PGA factor filing, Mr. Warren was unable to make a similar comparison or comment on the exact effects these reductions might have comparatively on the two company's rates. The Commission finds the testimony regarding the potential effect of the reduced PGA factors to be incompetent and insubstantial on this issue.

168. Empire is not serving any customers in Sections 15, 22, 23, and 24 of T52N, R35W.[189]

169. There is also no evidence in the record to establish that MGE is serving any Customers Sections 15, 22, 23, and 24 of T52N, R35W.

170. Empire has received no requests from any customer to provide natural gas service in Sections 15, 22, 23, and 24 of T52N, R35W.[190]

171. There are no developments, large or small, being constructed in Sections 15, 22, 23, and 24 of T52N, R35W.[191]

172. Empire's Witness Mr. Daniel Klein testified that the reason Empire requested a CCN for Sections 15, 22, 23, and 24 of T52N, R35W is that it views these sections as being "the logical progression of the growth of the Platte City area and anticipate significant residential growth there and desire to serve those customers."[192]

Findings of Fact in Relation to Whether MGE or Empire Violated Section 393.170, any other pertinent state statute, Commission Rule or Regulation, or any tariff provisions

173. Empire maintains that MGE intentionally and knowingly invaded their certificated service area, and constructed facilities outside of its own certificated area without proper Commission approval because:

a.) In June of 1999 Aquila, Empire's predecessor, became aware of MGE's plan to install facilities in the southeast Quarter Section of Section 6, T52N, R34W, to serve the Oak Creek Subdivision. After discussions with MGE representatives, MGE stopped construction of facilities in this area and Aquila installed facilities to serve the Oak Creek Subdivision.[193]

b.) As a result of the June 1999 encounter between Aquila and MGE, Aquila's attorney sent a letter to MGE

[189] Transcript p. 182, lines 3-14, 25, p. 183, lines 1-2.
[190] Transcript p. 178, lines 13-22, p. 182, lines 3-14, 25, p. 183, lines 1-2.
[191] Transcript p. 178, lines 13-22, p. 182, lines 3-14, 25, p. 183, lines 1-2.
[192] Transcript p. 183, lines 14-17.
[193] Empire Exh. 2, Teter Direct, p. 2, lines 10-17.

referencing the Commission's Case No 13,172 listing the sections of Platte County that Aquila (now Empire) was certified to serve. MGE did not respond.[194]

c.) On January of 2004, Empire became aware of the Seven Bridges Subdivision that was to be built in Sections 13 and 14 of T52N, R35W of Platte County.[195]

d.) In July or August of 2006, Empire became aware that the Seven Bridges development was under way in Section 12, as opposed to Sections 13 and 14 of T52N, R35W of Platte County.[196]

e.) In August of 2006, Empire's Vice-President and Chief Operating Officer for its gas division, met with MGE's president to discuss the disputed Sections over which both claim to have a certificate to provide service. Empire maintains that nothing resulted from this meeting.[197]

e.) On September 6, 2006, Empire sent an e-mail to MGE's Vice-President of Field Operations requesting an investigation into the Seven Bridges development with regard to which company should be serving this development in Section 12.[198]

f.) On October 16, 2006, MGE's Vice-President of Field Operations and Empire's Director of Gas Operations had a face-to-face meeting to discuss the certification issue – MGE proposed Empire abandon their certificate to Section 10, 11, and 12 and Empire offered to purchase all of MGE's facilities allegedly being operated without a certificate in Section 12 at MGE's current book value.[199]

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[194] Empire Exh. 2, Teter Direct, p. 3, lines 3-9. Staff Exh. 14.
[195] Empire Exh. 2, Teter Direct, p. 3, lines 13-20.
[196] Empire Exh. 2, Teter Direct, p. 4, lines 1-9.
[197] Empire Exh. 3, Gatz Direct, p. 9, lines 1-23, p. 10, lines 1-3.
[198] Empire Exh. 2, Teter Direct, p. 4, lines 10-15.
[199] Empire Exh. 2, Teter Direct, p. 5, lines 1-22, p. 6, lines 1-9.

g.) Empire claims that MGE is continuing to expand its distribution system in Sections 12, 13, and 14 of T52N, R35W and is using what appears to Empire to be the existence of unauthorized gas service to buttress its application to expand its certificated service area in Platte County.[200]

174. MGE maintains that it did not intentionally and knowingly invade Empire's certificated service area or violate Section 393.170 by constructing facilities outside of its own certificated area without proper Commission approval because:

a.) MGE appropriately relied upon its 1997 tariff when expanding its facilities in Sections 10, 11, and 12 in T52N, R35W, and when responding to the request of the Seven Bridges developer to provide natural gas service to the residents of the subdivision.[201]

b.) MGE immediately sought a CCN for Sections 13 and 14 upon discovering they were beginning to encroach into those sections for which they lacked a CCN.[202]

c.) Contrary to Empire's assertions, MGE did not pursue the 1999 Oak Creek development in Section 6 T52N R34W and Section 1 in T52N, R35W, because it was not able to reach an agreement with the developer, not because it lacked authority to serve.[203]

d.) MGE had the authority to serve Oak Creek and did not check its CCN at this time because it believed it could rely on its 1997 Commission-approved tariff to define its service territory.[204]

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[200] Empire Exh. 3, Gatz Direct, p. 18, lines 1-18.

[201] Transcripts pp. 93- 98, p. 119, lines 14-25, p. 120, lines 1-14

[202] MGE Exh. 2, Noack Rebuttal, p. 2 lines 22-23, p. 3, lines 1-2; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

[203] Transcript p. 90, lines 19-25, p. 91, lines 1-25, p. 92, lines 1-9, p. 95, lines 7-17, 24-25, p. 96, lines 1-8, 11-14, p. 97, lines 7-20, p. 98, lines 10-25, p. 99, line 1.

[204] *Id*.

e.) The 1999 exchange described by Empire only establishes that Aquila was aware, at least by 1999, that MGE's tariff authorized it to serve in certain sections where Aquila had a dual CCN. Aquila witness Teter testified that he had his staff review MGE's tariffs as a result of the 1999 letter and found that MGE's tariffs contained nine sections where Aquila had a CCN.[205]

f.) Both Aquila, Empire's predecessor, (as early as June of 1999) and Empire (no later than the summer of 2006) had knowledge that MGE's tariffs contained sections for which Aquila then and Empire now had a CCN but failed to act in any way to contest the validity of MGE's tariff until this certification case was filed.[206]

g.) MGE asserts that the Commission should not find any violations against MGE for relying on its tariffs, when Empire and its predecessor knew that MGE's tariffs contained sections with an overlapping CCN and when neither company did anything to protect its service territory.[207]

175. The Commission's Staff did not take a position on whether either company may have violated Section 393.170, or any other pertinent state statute, Commission Rule or Regulation, or any tariff provisions. On the contrary, Staff Witness Straub testified that:

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[205] Transcript p. 205, lines 16-25, p. 206, lines 1-27, p. 207, lines 1-12. Aquila witness Steve Teter, who was Aquila's Director of Missouri Gas Operations, acknowledged that it was not Aquila's custom to seek expansion of its territory and that it did not want to grow its business.[205] Transcript p. 200, lines 13-25, p. 201, lines 1-16.

[206] Transcript pp. 190-209. See also Finding of Fact Number 173 and associated footnotes. Although Aquila had knowledge that MGE's tariffs contained sections for which Aquila had a CCN, it did not inform Empire of this fact when Empire conducted due diligence regarding its purchase of Aquila gas properties. Empire completed its due diligence in September of 2005. Had Empire had knowledge of MGE's tariffs during this time, it is likely that it would have asked for further information, as it had a duty to investigate Aquila's CCN. Transcript p. 208, lines 14-25, p. 209, lines 1-25, p. 220, lines 1-6.

[207] Transcript p. 269, lines 24-25, p. 270, lines 1-3. The Commission takes notice that there have been no filings by any of the parties to this action, other than the immediate case, addressing whether the Commission's order approving MGE's 1997 Tariff was in error or in any way, unlawful.

a.) Staff confirms that ". . . to this day we have a lot of instances where there's uncertainty on service areas and who is allowed or required to serve in areas."[208]

b.) Staff witness Michael Straub testified that Staff had no explanation as to why it recommended approval of MGE's Original sheet 6.15, with the alleged errors listing its certificated areas, other than it was a mistake. Mr. Straub's testimony was as follows:

> Q. Okay. Do you have any explanation -- there are -- there are more than just nine overlapping sections in this tariff. I believe there's a total of 22 –
>
> A. Yes.
>
> Q. -- which Staff has stated is in error. Do you have any explanation why or how that slipped past Staff's review?
>
> A. I wish I did. And I -- and I must say it is embarrassing. But -- but at the same time, you've got to keep in mind that there are 2900 sections. And just to give you a reference of what a section is, that's a square mile.
>
> So there are 2900 square miles of MGE service territory all on the western side of the state. So it's an encumbering process to -- to get that together.
>
> And, yes, that wasn't Staff's brighter moment by missing that. But it's very understandable to see how something like that can happen, especially in the case of where you have the supply line sections.

[208] Transcript p. 267, lines 17-25, p. 268, lines 1-12.

We've talked a lot about the different types of certificates, whether it's an area certificate or a line certificate. But we need to keep in mind that there is more than one kind of line certificate.

We have a line certificate that allows customers -- utilities to serve based off of a line extension. And then we have the line certificate where it simply allows the transmission of the facilities through an area that's not in service area of the affected companies.

So it could have easily looked at those sections where the Leavenworth supply line is, and -- and I can understand how those would have mistakenly got included as service area because if you had to read 79 orders, by the time you get to No. 79, you're probably a little blurry.

And you -- you just see, okay, I see those sections. And so I can understand how those sections got -- got into the tariff.

The other sections that are not located where the supply line is is a little more difficult to understand. And it's -- it's even more difficult to understand how Staff missed it.

I do know, also, in a lot of other instances, especially historically, more than ten years ago, when the Commission would grant a service area to a utility, whether it be a gas or an electric utility, in most instances, it would grant to a gas utility as an example to the City of Sedalia and surrounding area. So there was always a dispute or a question as to really what surrounding area meant.

Well, we all know that it means -- if it's close to Sedalia and the company can provide service,

then that's the surrounding area. So there will be instances where there will be sections listed on MGE's tariff that it will be difficult to find a CCN for.

And it would be in those types of CCN cases where they would simply refer to the area as the rural area is another good example or surrounding area.

And we even have gas utilities that have been granted an entire county. So that's pretty easy when it's an entire county. But I guess what I'm getting at is -- is I know this on the surface is -- appears serious. And it is.

But on the other hand, it's -- compared to the magnitude of what we're dealing with, it's -- you know, we've got a very small section of the state or of MGE's service area where we're -- where we've discovered this problem, which is why the Staff is reviewing the '97 filing and making sure that if there are other instances like this that we can address those before it results in in type of case.

Q. Okay. And do I understand the process correct that MGE, the company, worked with Staff in determining which areas to include in its tariff?

A. I know they did work with Staff, and they did work with Mr. McDuffey. I wish I could tell you that I remember everything about this filing. But, honestly, the only thing I remember about this -- I remember two things about this filing.

One, the rate case where we wanted to get this into effect, where we wanted to get this taken care of because MGE is one of the --

> geographically, one of the largest gas utilities. So I remember that.
>
> And then I remember writing the sentence that we've all discussed simply because that was a very unique instance to add a sentence to the routing slip. So I do remember that.
>
> The interaction that I may have had with Mr. McDuffey during the filing, I'm -- I'm a total blank on. And -- and what I would go on now is simply that --what the tariff filing indicates in the routing slip.[209]

c.) As noted in Mr. Straub's testimony, Staff believes there is general confusion with regard to the service areas of gas companies that provide service in a large segment of Missouri.[210]

d.) Mr. Straub further testified, as noted above, that it would be expected to have difficultly finding orders supporting the granting of a CCN for MGE because of the Commission's use of broad language when describing service territories in its orders.[211]

e.) Mr. Straub also testified that he could only remember two things about this particular 1997 tariff filing by MGE, wanting to get the tariffs clarified and writing his annotation on the tariff routing slip.[212]

f.) Staff's witness Michael Straub also testified that there is no reason to believe that MGE acted in bad faith when it filed its revised tariff in 1997.[213]

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[209] Transcript p. 270, lines 4-25, pp. 271-272, p. 273, lines 1-17

[210] *Id*.

[211] *Id*.

[212] *Id*.

[213] Transcript p. 273, lines 18-25, p. 274, lines 1-9.

176. The Commission's Staff has not recommended that the Commission seek penalties against either MGE or Empire.[214]

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Conclusions of Law Regarding the Commission's Jurisdiction and Authority

Section 386.020 (18) defines a "gas corporation" as including "every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof." Section 386.020(42) defines "public utility" as including "every . . ., gas corporation, . . ., as [this term is] defined in this section, and . . . is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

MGE is a "gas corporation" and a "public utility" as those terms are defined in Sections 386.020(18) and (42), respectively, and; consequently, is subject to the jurisdiction, control and regulation of the Commission. Empire is also a "gas corporation" and a "public utility" as those terms are defined in Sections 386.020(18) and (42), respectively, and; consequently, is subject to the jurisdiction, control and regulation of the Commission.

Conclusions of Law Regarding Relevant Statutory Provisions, Commission Rules and Case Law

It is the long-standing view of Missouri's courts that the Public Service Commission Law is to be "liberally construed for the public's, *ergo* the consumer's protection."[215] The Court of Appeals in *De Paul*

[214] No where in the Transcript, or in the prefiled testimony from Staff's witnesses, was there a request that the Commission authorize its Staff to seek penalties against either company in this matter. In Staff's Post-hearing Brief, Staff recommends that MGE be ordered to correct its tariff and to either abandon or sell its infrastructure in the disputed sections to Empire. See *Staff's Brief*, Case Number GA-2007-0289, filed December 21, 2007, page 24 -26.

[215] *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo. App. 1976).

Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co. summarized this principal as followed:

> [T]he Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. In its broadest aspects, the general purpose of such regulatory legislation is to substitute regulated monopoly for destructive competition. But the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental. (Internal citations omitted.)[216]

Keeping this view in mind, the Commission will examine the relevant law and apply that law to the specific facts of this case.

Conclusions of Law Regarding Commission's Legal Authority to Grant a Certificate of Convenience and Necessity

"The legislature has seen fit to vest the Public Service Commission with exclusive authority to allocate the territory in which a particular utility may render service, by providing that the Commission shall pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory."[217] The governing statute for the grant of a certificate of convenience and necessity for the

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[216] *Id*. See also Section 386.610; *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 42-43 (Mo. 1931); *State ex rel. Electric Company of Missouri v. Atkinson, et al.*, 204 S.W. 897, 899 (Mo. banc 1918); *State ex rel. Pitcairn v. Pub. Serv. Comm'n*, 111 S.W.2d 222, 229 (Mo. App. 1937). *State ex rel. Crown Coach Company v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (Mo. App. 1944).

[217] *State ex rel. Doniphan Tel. Co. v. Pub. Serv. Comm'n*, 377 S.W.2d 469, 474 (Mo. App. 1964); *State ex rel. City of Sikeston v. Pub. Serv. Comm'n of Missouri*, 82 S.W.2d 105, 110 (Mo. 1935); *Pub. Serv. Comm'n v. Kansas City Power & Light Co*., 31 S.W.2d 67, 69-70 (Mo. banc 1930); *State ex rel. Harline v. Pub. Serv. Comm'n*, Mo. App., 343 S.W.2d 177, 182 (Mo. App. 1960).

allocation of service territory for the provision of natural gas service is Section 393.170, RSMo 2000. Section 393.170 provides:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
>
> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."[218] The term "necessity" does not mean "essential" or

[218] Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Service Commission*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas*

"absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"[219] and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.[220] It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.[221]

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide natural gas service, it offers little statutory guidance as to specific criteria that must be satisfied prior to the grant of such certificates. In fact, pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

The Commission has articulated the filing requirements for gas utility CCNs in Commission Rule 4 CSR 240-3.205, and the specific criteria to be used when evaluating applications of gas utility CCNs are more clearly set out in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. Id.[222]

Conclusions of Law Regarding Legal Effect of Granting a Certificate of Convenience and Necessity

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Service in Lebanon, Missouri, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

[219] Id.; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

[220] Id. *Beaufort Transfer Co*., 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

[221] *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra, quoting St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

[222] Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

Once the Commission grants a CCN to a LDC, the LDC has an obligation to serve the public in its allotted service areas. The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve.[223] A public utility cannot refuse service, "when exercising its public function; that is, furnishing something, a necessity, that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions."[224]

The Commission further notes that it has the authority to issue a certificate of convenience and necessity to a public utility even though such certificate will overlap with another public utility's area of service.[225] The public interest and convenience is the Commission's chief concern when determining whether to grant more than one certificate within one certificated area.[226]

Conclusions of Law Regarding the Legal Effect of a Commission Approved Tariff

"A tariff is a document which lists a public utility services and the rates for those services."[227] There can be no dispute that Commission has the power to approve gas company tariffs, and once the Commission approves a tariff, it becomes Missouri law.[228] Thus, both MGE's and

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[223] *State ex rel. Missouri Power and Light Co. v. Pub. Serv. Comm'n*. 669 S.W.2d 941, 946 (Mo. App. 1984); *City of Blue Springs, Mo. v. Central Development Ass'n*, 684 S.W.2d 44, 51 (Mo. App. 1984); *Harline*, 343 S.W.2d at 181-182; *State ex rel. Ozark Power & Water Co. v. Pub. Serv. Comm'n*, 229 S.W. 782 (Mo. 1921); *State ex rel. Kansas City Power & Light Co. v. Pub. Serv. Comm'n, et al.*, 76 S.W.2d 343 (Mo. 1934); *State ex rel. Federal Reserve Bank of Kansas City v. Pub. Serv. Comm'n*, 191 S.W.2d 307, 313 (Mo. App. 1945); *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41 (Mo. 1937).

[224] *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n*, 205 S.W. 36, 42 (Mo. 1918).

[225] *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 575 (Mo. App. 1997); *State ex rel. Missouri Pacific Freight Transp. Co. v. Public Serv. Comm'n*, 295 S.W.2d 128, 132 (Mo. 1956); *Crown Coach Co.*, 179 S.W.2d at 126-129; *State ex rel. Electric Co. of Missouri v. Atkinson*, 204 S.W. 897, 899-900 (Mo. banc 1918).

[226] *Osage Water Co.*, 950 S.W.2d at 575; *Missouri Pacific Freight*, 295 S.W.2d at 132; *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Pub. Serv. Comm'n*, 433 S.W.2d 596, 605 (Mo. App. 1968); *Crown Coach Co*., 179 S.W.2d at 126-129.

[227] *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 210 S.W.3d 330, 337 (Mo. App. 2006); *Bauer v. Sw. Bell Tele. Co*., 958 S.W.2d 568, 570 (Mo. App. 1997).

[228] Sections 393.130, 393.140(11), and 393.150; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. 2005); *A.C. Jacobs and Co., Inc. v. Union Elec. Co*., 17 S.W.3d 579, 583 (Mo. App. 2000); *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 548 (Mo. App. 1996). *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products*

Empire's tariffs have "the same force and effect as a statute directly prescribed from the legislature."[229] Tariffs are interpreted in the same manner as state statutes.[230] Consequently, Missouri courts would interpret Commission approved tariffs by trying to "ascertain the intent of [the company and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."[231] Courts can only look beyond the plain and ordinary language of a company's tariff "when the meaning is ambiguous or [acceptance of the plain and ordinary language] would lead to an illogical result defeating the purpose of the [tariff]."[232]

Pursuant to Section 386.270 RSMo, all Commission orders are prima facie lawful and reasonable.[233] Section 386.270 provides:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission's decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390.[234] In both of these

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Co., 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

[229] *Id.*; *Laclede Gas Co.*, 156 S.W.3d at 521; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co*., 937 S.W.2d 314, 317 (Mo. App. 1996); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987).

[230] *Id*.

[231] *Id*.

[232] *Id*.

[233] Section 386.270, RSMo 2000; *Missouri Gas Energy*, 210 S.W.3d at 337; Section 386.270. RSMo 2000.

[234] Sections 386.510 and 386.390, RSMo 2000; *State ex rel. Public Counsel v. Public Service Com'n*, 210 S.W.3d 344, 360 (Mo. App. 2006); *A.C. Jacobs and Co., Inc. v. Union Elec. Co*., 17 S.W.3d 579, 583 (Mo. App. 2000); *State ex rel. GTE North, Inc. v. Public Service Commission,* 835 S.W.2d 356, 367 (Mo. App. 1992); *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.*, 765 S.W.2d 618, 621 (Mo. App. 1988); Transcript

litigation choices, the burden of proof would lie with the petitioner challenging the lawfulness of the order approving the tariff.[235]

If a proper party believes there is an error in a Commission approved tariff, that party would have the two options for litigation described above. However, there is one additional mechanism whereby a Commission approved and effective tariff could be changed if discovered to be in error – voluntary revision.[236]

Conclusions of Law Regarding Contested Issues of Law

To understand this case completely the Commission was required to thoroughly review, dissect and interpret the orders it issued in 1955 and 1956 with respect to the predecessor companies for Empire and MGE. "The Commission is entitled to interpret its own orders and to ascribe to them a proper meaning and, in so doing, the Commission does not act judicially but as a fact-finding agency."[237]

Conclusions of Law regarding Sections 4 and 5 of T52N, R33W, 1, 2, 3, 4, 5, 6, of T52N, 34W, 1, 2, 3, 4, 5, and 6 of T52N, R35W, and 1 of T52N, R36W

The Commission's findings of fact reveal that despite the fact that Sections 4 and 5 of T52N, R33W, Sections 1, 2, 3, 4, 5, 6, of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R35W, and Section 1 of

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p. 261, lines 16-25, p. 262, lines 1-25, p. 263, lines 1-25, p. 264, lines 1-2 (Testimony of Staff Witness, Michael Straub). See also *In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission's Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of the Revenue Requirement*, Case No. ET-2002-210, Tariff No. 200200321, *Order Rejecting Tariff*, issued November 19, 2001, effective date November 24, 2001.

[235] "In cases where a complainant [brought pursuant to Section 386.390, RSMo 2000] alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof." *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968). In cases where a petitioner challenges the lawfulness of a Commission order pursuant to Section 386.510 the party seeking to set aside an order of the Commission shall have the burden of proof "to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be." Section 386.430, RSMo 2000; *Union Elec. Co.*, 765 S.W.2d at 621.

[236] Transcript p. 262, lines 1-25, p. 263, lines 1-102, p 269, lines 8-23(Testimony of Staff Witness, Michael Straub).

[237] *Beaufort Transfer Co.*, 610 S.W.2d at 100: *Missouri Pacific Freight*, 312 S.W.2d at 368; *Orscheln Bros. Truck Lines*, 110 S.W.2d 366.

T52N, R36W are listed in MGE's 1997 Commission-approved tariff for certificated service areas, there is no substantial or credible evidence in the record as a whole to support a conclusion of law that the Commission ever granted MGE a CCN for these fifteen particular sections. Additionally, there is no dispute that Empire has a Commission-approved CCN for Sections 1, 2, and 3 of T52N, R35W and 4, 5, and 6 of T52N, R34W; six of these fifteen sections and six of the nine sections listed in both MGE's and Empire's tariffs that are at issue.

As was previously noted, there are three proper methods for removing errors from a Commission-approved public utility's tariff: (1) a proper appeal of the order approving the tariff that erroneously reflects the grant of a CCN; (2) a properly filed complaint case challenging the legality of the order approving the tariff that erroneously reflects the grant of a CCN, and, (3) voluntary removal of the erroneously tariff sections by submission of a revised tariff.

Empire's predecessor in interest, MPSC, was an active participant in the 1955 and 1956 cases in which MGE's predecessor, GSC, was granted its current area certificates for Platte County. As such, it was in a position to review and monitor MGE's tariff filings in association with those actions and could have raised objections to any allegedly erroneous tariff filing at that time or challenged the lawfulness of any Commission order approving those tariff filings. No actions were filed during that time period contesting the status of GSC's tariffs.

In 1995 and 1996, the Commission issued appropriate notice and provided an opportunity to intervene in two cases where the Commission ultimately directed MGE to file updated tariff sheets to clarify its service territory.[238] One of those cases, GR-96-285, was a general rate increase case, in which Empire's predecessor, Aquila, was a party.[239] Consequently, Aquila was on notice that MGE was revising its tariffs. Additionally, in 1997, when the Commission worked with MGE in preparing its tariffs, Aquila could have intervened and requested that the tariffs be suspended and challenged their approval, they did not.

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[238] *In the Matter of the Application of Missouri Pipeline Company for Permission, Approval, and a Certificate of Public Convenience and Necessity Authorizing It to Modify and to Construct, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Pipeline, a Delivery Spur, Delivery Stations and Related Interconnections and Other Facilities and to Transport natural Gas in Portions of Cass and Jackson Counties, Missouri*, Case No. GA-96-130; See also Footnote 238, *infra*.

[239] *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area*, Case Number GR-96-285.

In 1999, Empire's predecessor, Aquila, was fully aware of MGE's expansion into the disputed sections, but again chose not to challenge this expansion or MGE's tariffs. As early as the summer of 2006, Empire itself was aware of the tariff discrepancies and the fact that there were overlapping service areas listed in the company's tariffs. Empire chose not to contest MGE's tariff, and only after this new certification action was filed did it elect to raise the issue of the accuracy of MGE's Commission-approved tariffs. Unfortunately, this case does not provide the appropriate action procedurally that can be used to challenge MGE's tariffs.

In short, although Empire and its predecessors have had multiple opportunities to address any alleged errors in MGE's tariffs, to date, they have taken no proper legal action to challenge MGE's Commission-approved tariffs or challenge whether MGE had a Commission-approved CCN for the sections in dispute. Consequently, at this stage of the proceedings pending before the Commission the only means available for correcting any errors in MGE's tariff is by voluntary revision.

Fortunately, MGE is serving no customers in Sections 4 and 5 of T52N, R33W, Sections 1, 2, 3, 4, 5, 6, of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R35W, and section 1 of T52N, R36W, and has volunteered to remove these fifteen sections from its tariff. In Part IV of MGE's Post-Hearing Brief and in paragraph 9 of MGE's Proposed Findings of Fact and Conclusions of Law, the company represents that it will remove these sections at the Commission's direction. MGE Witness Noack, also attested to this commitment in his pre-filed surrebuttal testimony.[240] According, the Commission will direct MGE to remove these fifteen sections from its tariff. This revision also eliminates any dispute between the parties with regard to which company has a Commission-approved CCN for Sections 1, 2, and 3 of T52N, R35W and Section 4, 5, and 6 of T52N, R34W; six of the nine sections currently listed in both MGE's and Empire's tariffs.

Conclusions of Law regarding Sections 7, 8, 9, 10, 11, and 12 of T52N, 35W, and 12 of T52N, R36W

Staff witness Straub testified that MGE's service territory covered some 2900 square miles on the western side of the state. He testified that it was an encumbering process to identify the exact extent of MGE's service area, that orders from ten years ago and beyond used non-

[240] MGE Exh. 3, Noack Surrebuttal, pp. 4-5.

specific language to describe service areas, and that it would be expected to find service areas in MGE's tariff where it would be difficult to pin-point a specific order granting them a CCN for that service area. [241]

Staff and MGE both attested to the long and complex review that was undertaken when MGE, with Staff's assistance, composed the 1997 tariff filing that was approved by the Commission. And despite any possible confusion with regard to the specifics of MGE's tariff, once the tariff was approved by the Commission MGE was obligated to provide service in Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W pursuant to its tariff.

More importantly, despite the confusion all of the parties have registered with regard to MGE's 1997 tariff filing, and the 80 Commission orders granting CCNs to MGE throughout its service territory, the Commission has determined in its Findings of Fact, that MGE has a valid Commission-approved CCN for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W.[242] The Commission also concludes, as a matter of law, that MGE has a valid Commission-approved CCN for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W.[243]

It is true that Empire also has a CCN to serve customers in Sections 10-12 in T52N, R35W, [244] and Empire's tariff accurately reflects

[241] Staff's witness Straub had testified as to the difficulty Staff faced when assisting MGE with its tariff revisions. Transcript page 271, lines 7-12. While Mr. Straub had supervised the Staff members working with MGE, the Commission notes that the Staff member primarily responsible for providing assistance with drafting MGE's revised tariff was Mr. Mack McDuffey. Unfortunately, Mr. McDuffey was not a witness in this case, and it is possible that he could have shed additional light on the inclusion of the twenty-two sections in dispute.

[242] Even MGE in this matter could not cite to a Commission order granting the CCN, but MGE's failure to locate the order, or properly interpret the 1956 order does not establish that there was no Commission-approved CCN. See Transcript pp. 93-94, 148-149. The parties simply failed to properly analyze the pertinent Commission orders, and interpretation of the Commission's prior orders is clearly part of the Commission's fact-finding mission. The Commission's interpretation of its own order obviously supersedes any party's impression of what those orders delineate.

[243] Specifically, and with emphasis, the Commission concludes that it's 1956 Modification Order granting GSC's request for the full use of the Leavenworth Supply Line had the effect of converting GSC's line certificate for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W, into an area certificate because it authorized the **full and unrestricted use** of the supply line in all areas where GSC had **"heretofore been certificated,"** (i.e. "any certificate," "all certificates" or "every certificate"), **near and beyond the MCI Airport**, **regardless of the type of certificate previously issued by the Commission**.

[244] Staff Exh. 18, Warren Rebuttal, p. 4, lines 5-9.

this CCN.[245] And even though the Commission has approved dual certificates for Sections 10, 11, and 12 of T52N, R35W, the Commission has the authority to grant dual certificates and it has found this grant to be in the public interest. Furthermore, the Commission concludes there is no substantial and competent evidence in this record that provides a compelling reason to change the status of these dual CCNs at this time.

The Commission's Staff argued for splitting Section 12 between the companies, Staff argued that there would be less of a safety concern associated with the homes served by MGE at the end of Oakmont Drive in Section 12, because Prairie Creek provides a natural barrier between Oakmont Subdivision and the Cooper Ridge and Seven Bridges Subdivisions in Section 12. Staff could not reference any other similar use of natural boundaries to divide service territories, and curiously, Staff also put forth a contradictory view that MGE should still be allowed to serve its current customers in Sections 10 and 11 without any boundaries between these customers and people or entities that might become Empire's future customers in those same sections.[246]

MGE and Empire share at least four linear miles of common boundary between their respective service areas and have shared three square-mile sections of dually certificated territory without any physical demarcation other than the traditional Township and Range surveys. They have shared these respective boundaries and service territories without complication, and it is unclear to the Commission how cutting off one corner of Section 12 to isolate some of MGE's customers, while allowing the mixing of customers from both companies in Sections 10 and 11 would result in less of a concern for customer safety.

In terms of safety issues, the Commission concludes that emergency personnel would have little difficulty directing a request to shut off gas to the correct company much easier just by knowing which subdivisions or communities the companies serve as opposed to which side of a creek they may or may not serve. Nor would it be a tremendous burden to have both companies shut off their gas in these three sections should the need arise, knowing that the companies have

[245] Staff Exh. 18, Warren Rebuttal, p. 4, lines 14-19, and Schedules 5 and 6 to the Exhibit with MPS and L&P Tariff Sheet No. 3. The January 1956 order granting Empire's predecessor in interest a service area certificate for Sections 10, 11, and 12 made perfect sense at the time because MGE's predecessor only had a line certificate for these sections until December 1956 when the Commission lifted the restrictions from Leavenworth Supply Line.

[246] Transcript pp. 238-239.

dual certificates to provide service. To accept Staff's position would require some 40 to 60 customers to switch providers, which is not only inconvenient and confusing, but an unnecessary change that generates additional cost with little to no gain. The Commission concludes that Staff's position regarding using Prairie Creek as a "natural boundary" for splitting Section 12 is not persuasive or compelling and this boundary would be just as arbitrary as any other boundary.[247]

The Commission also observes that the evidence presented concerning the Platte City Annexation Plan is totally speculative in nature. There is no time frame for any proposed annexation. Annexation is subject to voter approval, so there is also no affirmative indication that annexation will actually extend into any additional sections of Platte County. Moreover, if Platte City should expand its boundaries, there is no evidence in the record to support a conclusion that if the City's expansion intruded into MGE's service area, that MGE could not obtain a franchise agreement, similar to Empire's, in order to provide natural gas service to residents within the City's borders. The Commission concludes that the arguments raised by Empire, Staff, and OPC concerning the Platte City Annexation Plan and Empire's franchise agreement with Platte City are totally irrelevant.

Empire and MGE, or their predecessors, have been operating under the assumption that each was certificated in Sections 10, 11, and 12 for over fifty years. This has not led to the duplication of services or facilities, it has not resulted in any form of destructive competition, nor has this grant of dual certificates created any safety issues. In fact, the companies have co-existed in these sections without issue until it became time to determine which company should, as a matter of public interest, serve the Seven Bridges Subdivision, in Sections 13 and 14.

Empire is currently serving a very small group of customers in the northeast corner of Section 12, and is serving no customers in Sections 10 or 11. MGE is serving a larger group of customers in the southwest corner of Section 12. The slow expansion rate into these sections coupled with appropriate notice requirements will prevent any possible duplication of facilities and alleviate any safety concerns.[248]

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[247] Transcripts p. 236-239 and 246-248. See also Finding of Fact Number 118. The Commission finds the testimony of Witness Warren in regard to the use of a natural boundary, i.e. Prairie Creek is not competent, is insubstantial, and is non-credible.

[248] The Commission will address the public interest issues involved in the dual certificates in more detail in the next section where the Commission makes its determination on which company should be granted a certificate for Sections 13 and 14 of T52N, R35W.

The Commission concludes that MGE's 1997 Commission-approved tariff listing Sections , 7, 8, 9, 10, 11, and 12 of T52N, 35W, and 12 of T52N, R36W as part of its certificated service area is not in error and does not require correction.[249] MGE was justified in relying on its 1997, unchallenged, Commission-approved tariff to provide service to customers in these sections. Moreover, MGE was obligated, upon request, to provide service in any of these sections. MGE appropriately honored its Commission-approved tariff and Commission-granted CCN to provide service to the Seven Bridges Subdivision.

Because the Commission concludes that MGE has an approved CCN to provide service in these sections, and has held that CCN since December of 1956, Staff's Empire's and OPC's arguments that MGE could not rely on an erroneous tariff to provide service in these sections or to expand its certificated service area are all irrelevant and the Commission finds no need to address those arguments.[250] Similarly, the Commission finds no need to address the issue as to whether the Commission can award the grant of a CCN to a company after facilities have been built.[251]

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[249] The Commission further notes, that even assuming, *arguendo*, that the Commission had concluded the listing of these seven sections in MGE's tariff to be in error, which is the opposite of what the Commission concludes, no proper legal challenge was made in this matter that would have required MGE to correct its tariff with regard to these sections. While MGE has volunteered to remove Section 12 of T52N, R36W and Sections 7, 8, and 9 of T52N, R35W from its tariff, because the Commission concludes the tariff is not in error with respect to these Sections there is no need for such a correction.

[250] These parties cite to *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W.2d 469 (Mo. App. 1964), *Public Service Commission v. Kansas City Power & Light Company*, 31 S.W.2d 67 (Mo. 1930) and *State of Missouri ex rel. Imperial Utility Corporation v. Borgmann*, 664 S.W.2d 215 (Mo. App. 1983) for the proposition that erroneous tariffs cannot be used to expand service territory beyond the service area encompassed within an existing CCN.

[251] MGE notes that last year the Commission in Case No. EA-2006-0309 authorized, permitted and issued certificates of convenience and necessity to Aquila to construct, install, own and operate an electric power generation plant which was built before Aquila filed its application for a certificate. MGE also directs the Commission to the following cases providing similar post-construction CCNs: *In Re Louisiana Light, Power and Traction Company*, 11 Mo.P.S.C. 247, Case No. 2931(1921); *In Re Cairo Light & Power Company*, 14 Mo.P.S.C. 76, Case No. 3452 (1923); *In Re Missouri Electric Power Company*, 19 Mo.P.S.C. 102, Case Nos. 7732 & 7739 (1931); *In Re Santa Fe Hills, Inc.,* 4 Mo. P.S.C. (N.S.) 59, Case No. 11,241 (1952); *In Re Rockaway Beach Water Company*, 7 Mo.P.S.C. (N.S.) 54, Case Nos. 13,494 & 13,485 (1956); *In Re National Development of Clay County et al.*, 12 Mo. P.S.C. (N.S.), 199, Case No. 15,031 (1965); *In Re Union Electric Company,* 30 Mo.P.S.C. (N.S.) 468, Case Nos. EC-90-355, EA-90-250 and EA-91-54 (1991); *In Re*

The Commission recognizes that growth in Platte County will undoubtedly continue, even if the rate of growth is totally unpredictable. In order to ensure that no duplication of services occurs, and to prevent any possible issues related to public safety, the Commission will require MGE and Empire to provide notice to each other and to the Commission's Staff with regard to their respective developments and expansions into the dually-held certificated area of Sections 10, 11, and 12 of T52N, R35W. Should any concerns develop, any proper party may file a complaint action with the Commission, and the Commission shall regulate the expansion as required to serve the best interests of the public.

Conclusions of Law regarding Sections 13, 14, 15, 22, 23, and 24 of T52N, 35W

As was previously noted, the Court of Appeals appropriately held, when reviewing the Commission's decision in *Intercon Gas, Inc.*, that it is within the Commission's discretion to determine when the evidence indicates the public interest would be served when awarding a CCN.[252] Empire and MGE have both requested a new CCN for Sections 13 and 14 of T52N, R35W, and Empire has further requested a new CCN for Sections 15, 22, 23, and 24 of T52N, R35W. While the *Intercon* case did not provide an exhaustive list of factors the Commission may consider with regard to which company should be granted a certificate, the five-factor analysis articulated by the Commission in *Intercon* provides the Commission with solid basis for analyzing how the public interest can best be served when determining which, if any, company should receive a CCN for these six sections of land in Platte County.

Looking at the first *Intercon* factor for the grant of a CCN, there must be a need for the service.[253] In terms of need for service, there is a clear need for service in Sections 13 and 14 based upon the Seven Bridges developer's request for service from MGE. Seven Bridges is a large planned residential subdivision, comprised of approximately 1,500

Union Electric Company, 1 Mo.P.S.C.3d 332, Case No. EA-92-218 (1992); *In Re Osage Water Company*, 8 Mo. P.S.C.3d 280 (1999).

[252] *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d, 593 597-598 (Mo. App. 1993).

[253] *In Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

new homes to be constructed in Sections 11, 12, 13 and 14 of T52N, R35W, and clearly there is a need to provide natural gas service to the new home-owners as evidenced by the request directed to MGE to provide service.

On the other hand, there is absolutely no evidence in the record that supports granting Empire or MGE a CCN for Sections 15, 22, 23 and 24, in T52N, R35W. There are no customers being served in these sections by either company, there have been no requests for service and there is absolutely no development, large or small, occurring in these sections. As noted already in this order, Platte County's Annexation Plan is purely speculative and even if it outlines a future plan that would encompass these sections, this speculative plan in isolation also fails to substantiate a need for natural gas service in these four sections. The Commission concludes that Empire, the requesting company, shall not be granted a CCN for these four sections.

Intercon factor two requires the applicant for a CCN to be qualified to provide the proposed service. The Commission concludes, based upon its Findings of Fact, that both companies are qualified managerially, financially and technically to provide service to Sections 13 and 14 of T52N, R35W.

Intercon factors three and four require the applicant to have the financial ability to provide the service and the applicant's proposal must be economically feasible. Again, in this instance, both companies have the financial ability to provide the service and both could make a return on the companies' investment. However, the economies of the two companies differ in that the evidence in this record establishes that if Empire provides the service, it will be provided at a higher cost to the consumer. The cost to consumer analysis, however, only comprises a single portion of the analysis for the fifth *Intercon* factor, the public interest analysis.

Intercon factor five correlates to Section 393.170's requirement that the service must promote the public interest. Additionally, the Court of Appeals has noted that when the Commission conducts its public interest analysis that it is to consider the interest of the public as a whole, not singular interests of the companies involved.[254] The Court further stated that the public interest involves the determination on how the utility service in question can be best provided at the lowest rate to the

[254] *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. 1980); *State ex rel. Consumers Public Service Co. v. PSC*, 180 S.W.2d 40, 44-45 (Mo. banc 1944).

user.[255] Part of this consideration of cost includes an analysis of whether a company has existing infrastructure in place and the cost required to construct new infrastructure.[256]

The Commission has already concluded that MGE and Empire both have Commission-approved CCNs to serve Sections 10, 11, and 12 of T52N, R35W; sections that are contiguous with Sections 13 and 14. However, MGE also has a CCN to serve, and is currently serving customers in Sections 7, and 18 of T52N, R34W, as well as in Sections 10, 11, 12 of T52N, R35W – these sections all being contiguous with Sections 13 and 14. Having more common border with the new sections to be served is a factor that weighs in MGE's favor. MGE can provide service to Seven Bridges more efficiently based upon the location of its currently existing facilities.

MGE is already serving customers in Sections 10 and 11, whereas Empire is not providing service in these Sections and apparently has no infrastructure in these Sections. MGE is serving customers in Section 12 in close proximity to the new customers to be served in Sections 13 and 14, whereas Empire is not. MGE was requested by the developer to provide service to Seven Bridges and received a construction advance from the developer of Seven Bridges to cover the cost of the extension of its gas facilities to phases one through four of the subdivision, whereas Empire did not.[257]

MGE began construction of the extension facilities to Seven Bridges immediately after signing a contract with the developer and began providing service to customers in the first phase of the subdivision in Section 12 in early 2006.[258] This construction included the placement of main extensions from its twelve-inch Leavenworth Supply Line to

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[255] *Id*.
[256] *Id*.
[257] MGE Exh.1, Noack Direct, p. 5, lines 6-9. Empire's Witness Ronald Gatz testified that it was his opinion that a portion of the construction advance to MGE could be refundable to the developer and/or transferred to Empire along with MGE's infrastructure. See Transcripts pp. 216-219. Mr. Gatz was allowed to answer questions in this regard over MGE's objection that such answers would be speculative. Mr. Gatz was instructed that he could answer the questions if he had personal knowledge regarding the construction advance at issue. Mr. Gatz, however, answered the questions based upon his personal opinion not on personal knowledge of the specific construction advance at issue. Mr. Gatz's response was totally speculative in nature, and the Commission finds his response to this questioning to be incompetent and insubstantial.
[258] MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript, p. 150, lines 21-25.

serve the portion of the Seven Bridges that would be constructed in Sections 13 and 14.[259] MGE began construction in Sections 13 and 14, prior to its discovery that it needed to make its current request for a CCN to serve in those sections.

Empire, on the other hand, even if it was able to utilize MGE's current infrastructure, would have to construct new main and secondary loops that would cross MGE's Leavenworth Supply Line to supply Seven Bridges. Not only would this result in a duplication of facilities and increased cost that could be passed on to the rate-payers, but this crossing of main and supply lines could result in a potential safety hazard.[260] MGE has already placed infrastructure in the ground and is already providing service to a portion of Seven Bridges. Granting MGE a CCN would promote continuity in the continued development and provision of service to these sections because they are adjacent to the Leavenworth Supply Line and MGE already has infrastructure in place.

MGE has existing infrastructure in place to serve the Seven Bridges Subdivision in Sections 10, 11 and 12 where it already has a Commission-approved CCN. Even if Empire was allowed to use these facilities, which would require a decision beyond the authority of this Commission,[261] Empire would incur additional costs to construct additional infrastructure to serve Seven Bridges, and bills for Empire's customers are already thirteen percent greater than bills for MGE's customers.[262] Moreover, the developer of Seven Bridges has expressed its preference for MGE to serve its customers by contracting with MGE.

In summation, given the location of MGE's current infrastructure, its readily available supply of gas from its Leavenworth Supply Line, the cost comparison demonstrating that MGE can provide service to its customers at a lower charge, the customer's preference for MGE to

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[259] MGE Exh. 2, Noack Rebuttal, p. 7 lines 10-12. The Leavenworth Supply Line was constructed to serve what is now the Kansas City International Airport and the adjacent area. MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3.

[260] Transcript pp 158-159.

[261] While the Commission might have authority to seek injunctive relief to suspend the provision of services by a regulated utility if that regulated utility lacked proper authority form the Commission to provide that service, it is very clear that the does not have authority to grant equitable relief, i.e. order the sale of a companies infrastructure to another regulated entity. See *Public Serv. Comm'n v. Kansas City Power & Light Co.,* 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930); *Intercon Gas, Inc.*, 848 S.W.2d at 596-597; *May Dep't Stores Co.*, 107 S.W.2d at 49; *Am. Petroleum Exch. v. Pub. Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo.1943); *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo*., 116 S.W.3d 680, 696 (Mo. App. 2003).

[262] See Findings of Fact Numbers 151-167.

provide service to Seven Bridges and the continuity of service that MGE can provide to this region, the Commission finds it to be in the public interest to grant MGE a CCN to serve Section 13 and 14 of T52N, R35W.

Conclusions of Law Regarding if the Commission Should Authorize its Staff to Seek Penalties

> Section 386.570 provides:
> 1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.
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> 2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.
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> 3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

Section 386.600 authorizes the Commission to seek such penalties in the circuit court. It provides, in pertinent part:

> An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit

> court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

These statutes together authorize the Commission to seek penalties for violation of Section 393.170, a Commission order, the Commission's Rules or a company's tariff provisions.[263] However, the Commission may only initiate such a lawsuit seeking penalties after holding a contested hearing.[264]

The Commission concludes that there is simply no substantial or credible evidence in the record to support a conclusion that either company has violated any statute, Commission Rule or tariff provision. Similarly, there is no substantial or credible evidence that either company has acted in bad faith.

MGE reasonably relied on its tariff when supplying requested service in Sections 10, 11 and 12 of T52N, R35W, and was required to provide service when asked. In fact, as the Commission has determined, MGE was also appropriately certificated to provide service in Sections 10, 11 and 12, and again, the certificate is mandate to provide service when it is requested. MGE did not violate Section 393.170 by constructing facilities in Sections 10, 11 and 12, because it had already obtained the permission and approval of the Commission to provide natural gas service in these sections. MGE did not intrude upon Empire's certificated service area, nor did it seek to inappropriately expand its service territory beyond what it had Commission approval to serve when it filed its 1997 tariff.

MGE also immediately sought a Commission CCN for Sections 13 and 14 once it discovered it had begun to encroach in areas beyond its certificated service territory. Sections 13 and 14 were not certificated at the time MGE began its expansion, and it halted construction and sought Commission approval as soon as it was practically possible.[265] The Commission concludes that there was no violation of Section

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[263] See *State v. Davis,* 830 S.W.2d 27 (Mo. App. 1992), where the court held that the Commission's petition seeking penalties for violations of the law or refusals to follow orders of the Commission stated a claim upon which relief could be granted.

[264] *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo. App. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. banc 1940).

[265] MGE Exh. 2, Noack Rebuttal, p. 2 lines 20-23, p. 3, lines 1-2; p. 5 lines 11-24; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

393.170 in this instance either, not where the company has made a good faith effort to comply with the statute in the most expedient manner possible under the circumstances.

Conversely, the Commission concludes that Empire did not lay in wait before filing its application for a CCN in the contested territory in an attempt to take over MGE's already constructed facilities or in attempt to dislodge MGE at a loss of its investment in infrastructure in any way. Empire did not intentionally delay raising the issue of what sections in Platte County constituted MGE's certificated service area in Platte County with the Commission. There is no competent or substantial evidence to substantiate such a conclusion. Empire and its predecessor may have slept on a possible expansion of its territory, and may have failed to file an appropriate procedural challenge to MGE's 1997 Commission-approved tariff, but those decisions constitute business judgments that are outside the jurisidiction of this Commission.[266]

The Commission concludes that, under the facts of this case, there has been no violation of Section 393.170, or any other statute, Commission rule, or tariff provision by either MGE or Empire. The Commission shall not authorize its Staff to seek penalties against either company.

Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

For the reasons cited herein, the Commission shall:

a.) acknowledge that MGE has a Commission-

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[266] *Harline,* 343 S.W.2d at 181-182. "The utility's ownership of its business and property includes the right of control and management, subject, necessarily, to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare." *Id*.

approved CCN for Section 12 in T52N, R36W, Sections 7, 8, 9, 10, 11, and 12 in T52N, R35W (7 sections total), pursuant to the Commission's 1955 and 1956 orders in Case No. 12,632;

b.) grant MGE a CCN for Sections 13 and 14 in T52N, R35W;

c.) acknowledge there has been no change in the status of Empire's CCN for Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5, and 6, of T52N, R34W;

d.) have MGE revise its tariff, in accordance with MGE's representation to voluntarily correct its Tariff Sheet 6.15 to reflect it has no CNN for Section 1 of T52N, R36W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R35W, and Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, and Sections 4, and 5 of T52N, R33W;

e.) deny Empire's request for a CCN in Sections 15, 22, 23, and 24 of T52N, R35W;

f.) direct Empire and MGE to provide notice to each other and to the Staff of the Commission regarding any future development and expansion in Sections 10, 11, and 12 of T52N, R35W, where they hold dual certificates; and,

g.) direct Empire and MGE to file revised tariff sheets identifying which types of certificates they have (i.e. transport, line, or service area certificates) in their tariffs.

IT IS ORDERED THAT:

1. The "Motion of The Empire District Gas Company to Strike a Portion of and Attachment to MGE's Post-hearing Brief," filed on December 28, 2007, is granted. The section in MGE's post-hearing brief entitled "Comments of Affected Customers" and Exhibit 1, attached to

MGE's brief are hereby stricken from the record.

2. The Commission acknowledges that Missouri Gas Energy's Tariff Sheet 6.15 correctly reflects, that pursuant to the Missouri Public Service Commission's 1955 and 1956 orders in Case No. 12,632, Missouri Gas Energy has a Commission-approved Certificate of Convenience and Necessity for Section 12 in T52N, R36W, and Sections 7, 8, 9, 10, 11, and 12 in T52N, R35W in Platte County, Missouri.

3. Missouri Gas Energy is granted a Certificate of Convenience and Necessity to provide natural gas service in Sections 13 and 14 in T52N, R35W, in Platte County, Missouri.

4. Missouri Gas Energy shall revise its current Tariff Sheet 6.15, in accordance with its representation to voluntarily correct its Tariff, to reflect it has no Certificate of Convenience and Necessity for Section 1 of T52N, R36W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R35W, and Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, and Sections 4, and 5 of T52N, R33W; all in Platte County, Missouri.

5. The Commission acknowledges there has been no change in the status of Empire's Certificate of Convenience and Necessity for Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5, and 6, of T52N, R34W in Platte County, Missouri.

6. The Empire District Gas Company's request for a Certificate of Convenience and Necessity in Sections 13, 14, 15, 22, 23, and 24 of T52N, R35W, in Platte County, Missouri is denied.

7. The Empire District Gas Company and Missouri Gas Energy shall provide notice to each other, and to the Staff of the Missouri Public Service Commission, regarding any future development and expansion in Sections 10, 11, and 12 of T52N, R35W in Platte County, Missouri, where they hold dual certificates.

8. The Empire District Gas Company and Missouri Gas Energy shall file revised tariff sheets with the Commission identifying which types of certificates they have (i.e. transport, line, or service area certificates) in all of the areas in which they hold any type of certificate to provide any type of natural gas service.

9. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein are hereby denied.

10. This order shall become effective on February 24, 2008.

11. This case shall be closed on February 25, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 14th day of February, 2008.

Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission v. Amega Sales, Inc., d/b/a Quality Preowned Homes, Columbia Discount Homes, Mark Twain Mobile Home Sales, Chateau Homes, and Amega Sales, Inc.

Case No. MC-2008-0071
Decided: February 14, 2008

Manufactured Housing §4. The Director of the Manufactured Housing and Modular Units Program of the Public Service Commission had the authority to bring a complaint since the Director is acting under a delegation of power and responsibility from the Commission and Section 386.390 RSMo 2000 allows the Commission to hear a complaint brought on its own motion.

Manufactured Housing §4. The Commission did not have the authority to revoke Amega's registration for an alleged violation of Section 700.015. However, the Commission had the authority to revoke a dealer's registration for conduct violating Section 407.020 and to determine whether particular conduct falls within the statute's prohibition. Also the Commission did not have the authority under Section 700.115.2 to impose a civil penalty for violation of Section 407.020.

Manufactured Housing §16. The Commission did not have the authority to revoke Amega's registration for an alleged violation of Section 700.015. However, the Commission had the authority to revoke a dealer's registration for conduct violating Section 407.020 and to determine whether particular conduct falls within the statute's prohibition. Also the Commission did not have the authority under Section 700.115.2 to impose a civil penalty for violation of Section 407.020.

Manufactured Housing §17. The Commission had the authority to revoke a dealer's registration for conduct violating Section 407.020 and to determine whether particular conduct falls within the statute's prohibition.

Manufactured Housing §19. The Commission did not have the authority under Section 700.115.2 to impose a civil penalty for violation of Section 407.020.

ORDER REGARDING MOTIONS TO DISMISS

On September 7, 2007, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed a complaint against Amega Sales, Inc., d/b/a Quality Preowned Homes, Columbia Discount Homes, Mark Twain Mobile Home Sales, Chateau Homes, and Amega Sales, Inc. Amega currently holds a separate Certificate of Dealer Registration under each of the five names under which it is doing business.

Staff's complaint alleges seven counts, involving three manufactured homes sold by Amega through one of the entities by which it does business. Counts I and II concern a manufactured home sold to a customer named Nelson, which the Director alleges was damaged in transit or at Amega's sales lot. Because of the damage, the manufactured home did not comply with the applicable HUD Code, but the Director alleges Amega sold the home to its customer as a new home without disclosing the damage or the failure of the home to comply with Code. Count I requests authority to seek monetary penalties against Amega, while Count II asks the Commission to revoke all the dealer registrations under which Amega does business.

Counts III and IV concern a manufactured home sold to a customer named Whitford, and Counts V and VI concern a manufactured home sold to a customer named Gilmore. Again, the Director alleges Amega sold damaged homes without disclosing the damage or the failure of the home to comply with Code. Counts III and V request authority to seek monetary penalties against Amega and Counts IV and VI ask the Commission to revoke Amega's dealer registrations.

Count VII concerns the manufactured home sold to Gilmore and alleges Amega attempted to deliver the home to the customer even after the Director's inspector "red tagged" the home as being in violation of Code. The complaint alleges this attempt to sell a "red tagged" home violates the terms of a stipulation and agreement approved by this Commission to resolve an earlier complaint by the Director against Amega and its owner, Greg DeLine. The Director alleges that stipulation and agreement requires Amega to pay a $10,000 civil penalty if it attempts to sell a "red tagged" home and asks for authority to seek such a penalty.

On January 18, 2008, Amega filed three separate motions asking the Commission to dismiss various counts of the Director's complaint. On January 28, the Director filed a timely response to each of

Amega's motions. Amega replied on February 4. Although Amega filed its motions separately, they are interrelated and the Commission will take them up in this single order.

The Motion to Dismiss Counts II, IV, and VI

Amega's first motion asks the Commission to dismiss Counts II, IV, and VI of the Director's complaint. The counts Amega challenges in this motion are those that ask the Commission to revoke Amega's dealer registrations. The Director alleges those registrations should be revoked because Amega's misrepresentations to its customers, its failure to disclose the true condition of the manufactured home, and its concealment of material facts about the condition of the home, violate the provisions of Missouri's Merchandising Practices statute, specifically, Section 407.020, RSMo (Supp. 2007). In addition, the Director alleges the sale of a manufactured home that did not comply with code is a violation of Section 700.015.1, RSMo (Supp. 2007), which is made a violation of Section 407.020 by Section 700.115.1, RSMo 2000.

Amega challenges the Director's legal authority to bring its complaint on several grounds, some general, and some specific to these counts. First, as a general matter, Amega argues the Director lacks statutory or other authority to file a complaint before the Commission. Amega is incorrect; the Director's authority is based on a series of statutory and regulatory provisions.

Section 700.040.4, RSMo 2000 gives the Commission authority to "appoint such employees within its department as it may deem necessary for the administration of the provisions of sections 700.010 to 700.115." Commission Rule 4 CSR 240-120.031 delegates the Commission's power and responsibility under Chapter 700, RSMo to the Director of the Manufactured Housing and Modular Units Program of the Public Service Commission. Section 700.100.2, RSMo (Supp. 2007) allows the Commission to consider a complaint filed with it to revoke or suspend a dealer's registration. Finally, Section 386.390, RSMo 2000 allows the Commission to hear a complaint brought on its own motion. Since the Director is acting under a delegation of power and responsibility from the Commission, his authority to bring a complaint is the same as the authority of the Commission to bring a complaint on its own motion.

As a second general argument, Amega contends the Director is part of the Commission, meaning the complaining party and the trier of fact are essentially the same entity. It argues that circumstance violates the substantive and procedural due process clauses of the United States

Constitution and the Missouri Constitution, the equal protection clauses of the Missouri Constitution and the United States Constitution, and the Doctrine of Separation of Powers found in the United States Constitution and the Missouri Constitution.

This Commission, of course, has no authority to declare any statute unconstitutional, so it cannot rule on Amega's constitutional arguments. The Commission notes, however, that when ruling on this question, the United States Supreme Court found this administrative arrangement to be constitutional.[1]

In addition to its general arguments, Amega raises arguments specific to these counts and the statutes under which the Director asks the Commission to act. Amega points out that the Director's complaint asks the Commission to revoke Amega's registrations under authority granted to the Commission in Section 700.100.3, RSMo. That statute specifies eleven actions that would constitute sufficient grounds for the revocation of a dealer's registration.[2] The Director's complaint asks the Commission to revoke Amega's registrations on two of those grounds.

First, the Director contends Amega has engaged in conduct that violates the provisions of Section 407.020, which is a section of

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[1] *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975).

[2] That section of the statutes states as follows:

3. The following specifications shall constitute grounds for the suspension, revocation or placing on probation of a manufacturer's or dealers' registration:

(1) If required, failure to comply with the provisions of section 301.280, RSMo;

(2) Failing to be in compliance with the provisions of section 700.090;

(3) If a corporation, failing to file all franchise or sales tax forms required by Missouri law;

(4) Engaging in any conduct which constitutes a violation of the provisions of section 407.020, RSMo;

(5) Failing to comply with the provisions of Sections 2301-2312 of Title 15 of the United States Code (Magnuson-Moss Warranty Act);

(6) As a dealer, failing to arrange for the proper initial setup of any new manufactured home or modular unit sold from or in the state of Missouri, unless the dealer receives a written waiver of that service from the purchaser or his or her authorized agent;

(7) Requiring any person to purchase any type of insurance from that manufacturer or dealer as a condition to his being sold any manufactured home or modular unit;

(8) Requiring any person to arrange financing or utilize the services of any particular financing service as a condition to his being sold any manufactured home or modular unit; provided, however, the registered manufacturer or dealer may reserve the right to establish reasonable conditions for the approval of any financing source;

(9) Engaging in conduct in violation of section 700.045;

(10) Failing to comply with the provisions of section 301.210, RSMo;

(11) Failing to pay all necessary fees and assessments authorized pursuant to sections 700.010 to 700.115.

Missouri's Merchandising Practices statute that defines unlawful merchandising practices. Second, the Director contends that Amega has violated Section 700.015.1, RSMo, which forbids the sale of a manufactured home that does not comply with Code.[3]

Amega attacks the second ground by pointing out that Section 700.100.3 does not specifically list the violation of Section 700.015 as a ground for the revocation of a registration, although it does specifically list the violation of other sections of Chapter 700 as grounds for revocation. Staff attempts to get around the statutes' omission of Section 700.015 by citing Section 700.115.1, which establishes that "a violation of the provisions of sections 700.010 to 700.115 shall constitute a violation of the provisions of section 407.020". Since the violation of Section 700.015 constitutes a violation of Section 407.020, and Section 700.100.3(4) allows the Commission to revoke a registration for "any conduct which constitutes a violation of the provisions of section 407.020, RSMo", the Director's argument is that the Commission can revoke a registration for violation of Section 700.015, as a violation of Section 407.020.

The Director's argument is logically sound, but unfortunately for his position, the Missouri Court of Appeals rejected that argument in a 1996 decision. In *State ex rel. Mobile Home Estates, Inc. v. Public Service Commission*,[4] the Commission had suspended the dealer registration of a manufactured housing dealer for one year for selling a home that did not meet Code. In suspending the registration, the Commission found that the dealer had engaged in conduct constituting a violation of the provisions of Section 407.020, the ground specified in Section 700.100.3(4). The Commission reached that conclusion on the basis of the violation of Section 700.015.1, which is made a violation of Section 407.020 by Section 700.115.1.

The Court of Appeals, however, found that Commission's order to be unlawful in that the Commission lacked authority to suspend the registration for violation of Section 700.015.1. The court specifically rejected the Commission's argument that Section 700.115 made the violation of Section 700.015 a violation of Section 407.020 for purposes of giving the Commission authority to revoke a dealer's registration.

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[3] That section of the statute states as follows:
No person shall rent, lease, sell or offer for sale any new manufactured home manufactured after January 1, 1974, unless such manufactured home complies with the code and bears the proper seal.

[4] 921 S.W. 2d 5 (Mo. App. W.D. 1996)

The argument rejected by the *Mobile Home Estates* court is legally and factually indistinguishable from the argument offered by the Director in this case. Therefore, the *Mobile Home Estates* decision is controlling and the Commission must conclude that it does not have authority to revoke Amega's registration for an alleged violation of Section 700.015. To that extent, Amega's motion to dismiss must be granted.

However, a violation of Section 700.015 is not the only ground on which the Director asks the Commission to revoke Amega's registration. The Director also alleges that Amega directly violated the provisions of Section 407.020.1 by misrepresenting the condition of the homes, failing to disclose that the homes had been damaged, and concealing material facts about the condition of the homes from the purchasers. Section 700.100.3(4) explicitly gives the Commission authority to revoke a registration for "engaging in any conduct which constitutes a violation of the provisions of section 407.020, RSMo," so the *Mobile Home Estates* decision does not bar the Commission's consideration of that portion of the Director's complaint.

Amega instead argues that the Commission is without authority to find a violation of Section 407.020, contending that such a finding can be made only by a court, not an administrative agency. In support of that argument, Amega cites various decisions dealing with Section 407.020. Those cases explain that the statute supplements the definition of common law fraud to "preserve fundamental honesty, fair play and right dealings in public transactions."[5] Statutes such as this one do not "attempt to define deceptive practices or fraud, but merely declare unfair or deceptive practices unlawful, leaving it to the court in each particular instance to declare whether fair dealing has been violated.[6]

Amega seizes on the statement that a finding that deceptive practices or fraud has occurred is left to the court in each particular instance to argue that only a court, and not an administrative body, may make that determination. That argument is not supported by the decisions and is countered by the explicit language of Section 700.100.3, which gives the Commission authority to revoke a dealer's registration for engaging in conduct that violates the provisions of Section 407.020. For that limited purpose, the legislature gave the Commission the

[5] *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60, 63 (Mo. App. E.D. 1987), quoting *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973)
[6] *Id* (internal citations omitted).

authority to determine whether particular conduct falls within the prohibition of the statute. For the portion of the Director's complaint that seeks to revoke Amega's dealer registration for conduct violating the provisions of Section 407.020, Amega's motion to dismiss will be denied.

This ruling means that if the Director is to prove his complaint, he will need to prove that Amega engaged in conduct that violated the provisions of Section 407.020, not simply that Amega sold a home that did not meet code. That does not preclude the Director from presenting evidence that the Code was violated as part of his proof that the provisions of Section 407.020 have been violated.

The Motion to Dismiss Counts I, III, and V

Counts I, III, and V of the Director's complaint ask the Commission to authorize the Commission's General Counsel to proceed to circuit court to seek civil penalties against Amega for the sale of manufactured homes that did not comply with Code. The Commission has the authority to pursue such penalties, acting through its General Counsel, under Section 386.600, RSMo 2000.

As indicated in the discussion of the previous motion, the sale of a manufactured home that does not comply with code is a violation of Section 700.015. Section 700.115.2 states in relevant part: "whoever violates any provision of this chapter shall be liable to the state of Missouri for a civil penalty in an amount which shall not exceed one thousand dollars for each such violation." Section 700.015 is a part of "this chapter" so a violation of that section would justify the imposition of a civil penalty under Section 700.115.2.

Although violation of Section 700.015 directly justifies imposition of a civil penalty under Section 700.115.2, Counts I, III, and V of the Director's complaint state that Amega's violation of Section 700.015 is a violation of Section 407.020, and ask the Commission to make a finding to that effect. Amega again argues that only a court, not an administrative agency, can determine that Section 407.020 has been violated. For that reason, Amega asks the Commission to either dismiss Counts I, III, and V, or, as an alternative, strike from the prayer for relief the Director's request that the Commission find a violation of Section 407.020.

The Commission has previously found that Section 700.100.3(4) gives it the authority to determine whether Section 407.020 prohibits particular conduct within the context of deciding whether to revoke a dealer's registration. However, Section 700.115.2, which authorizes the imposition of a civil penalty for violation of any provision of Chapter 700,

makes no mention of Section 407.020. Therefore, the Commission is not given authority under that section to find a violation of Section 407.020. Furthermore, since it can find a violation of Section 700.015 directly, there is no need for the Commission to make any findings regarding Section 407.020 in these counts of the complaint. The Director's request that the Commission make such finding will be struck from Counts I, III, and V. In all other respects, the Motion to Dismiss Counts I, III, and V will be denied.

The Motion to Dismiss Count VII

Count VII of the Director's complaint explains that Amega and its owner, Greg DeLine, entered into a stipulation and agreement in 2006 to resolve a previous complaint brought by the Director. The Commission approved that stipulation and agreement in Case Number MC-2004-0079. Paragraph 6.b of the approved stipulation and agreement states in part: "Amega and DeLine covenant and agree that Amega, its affiliate, or DeLine, will not sell any manufactured home that is 'red tagged' at the time of sale." Paragraph 6.c of the stipulation and agreement provides that if Amega, its affiliate, or DeLine violates that provision they are to pay a $10,000 civil penalty. That paragraph also states: "[t]he Commission shall have the power to determine whether any violations of this Paragraph 6 have occurred, subject to rights of appeal and judicial review as provided for under Missouri law."

The Director's complaint alleges Amega attempted to deliver a "red tagged" home to a customer and thereby violated paragraph 6 of the stipulation and agreement. On that basis, the Director asks the Commission to find that Amega is liable for a penalty of $10,000 and authorize the General Counsel to go to circuit court to seek such penalties.

Amega argues that since the Commission is not a court, it does not have the authority to construe or enforce contracts. Therefore, the Commission does not have authority to interpret or construe the stipulation and agreement to determine if the actions alleged in the complaint constitute a violation of the stipulation and agreement.

As Amega indicates, the Commission cannot construe or enforce a contract. Furthermore, the Commission cannot order Amega to pay a financial penalty. That power is reserved to the courts. However, the Director does not ask the Commission to grant any relief that is beyond the Commission's authority to give. Rather, the Director asks the Commission to find that Amega has violated paragraph 6 of the

stipulation and agreement and authorize the General Counsel to seek penalties for that violation.

When the Commission approved the stipulation and agreement, it also ordered Amega to comply with the terms of the stipulation and agreement.[7] So, if Amega violated the terms of the stipulation and agreement, it also violated the Commission's order. Section 386.390.1, RSMo 2000 gives the Commission the authority to hear complaints alleging the violation of any "rule or order or decision of the commission." Therefore, the Commission has the necessary authority to hear the Director's complaint alleging a violation of the stipulation and agreement and can direct its General Counsel to pursue penalties in circuit court if it finds such a violation. The enforcement of the stipulation and agreement would then be left to the appropriate judicial authority. Amega's motion to dismiss count VII of the Director's complaint will be denied.

IT IS ORDERED THAT:

1. The portions of Counts II, IV, and VI of the Director's complaint that ask the Commission to revoke Amega Sales, Inc.'s dealer registrations for a violation of Section 700.015.1, RSMo (Supp. 2007) are struck from the complaint. In all other respects, Amega Sales, Inc.'s Motion to Dismiss Counts II, IV, and VI is denied.

2. The portions of Counts I, III, and V of the Director's complaint that ask the Commission find that Amega Sales, Inc. has violated Section 407.020, RSMo (Supp. 2007) are struck from the complaint. In all other respects, Amega Sales, Inc.'s Motion to Dismiss Counts I, III, and V is denied.

3. Amega Sales, Inc.'s Motion to Dismiss Count VII is denied.

4. This order shall become effective on February 14, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

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[7] Order Approving Stipulation and Agreement, *Director v. Amega Sales, Inc.* Case No. MC-2004-0079 (October 17, 2006).

In the Matter of the Verified Petition of Union Electric Company, d/b/a AmerenUE, to Establish An Infrastructure System Replacement Surcharge

Case No. GT-2008-0184
February 26, 2008

Gas §18. Union Electric Company, d/b/a AmerenUE, is authorized to collect an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenues in the amount of $1,211,459.

Rates §81. Union Electric Company, d/b/a AmerenUE, is authorized to collect an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenues in the amount of $1,211,459.

Rates §108. Order authorizing Union Electric Company, d/b/a AmerenUE, to collect an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenues.

ORDER APPROVING ISRS RATES AND TARIFF

On November 30, 2007, Union Electric Company, d/b/a AmerenUE, filed a verified petition to establish an infrastructure system replacement surcharge (ISRS). AmerenUE's petition was accompanied by an implementing tariff. The Commission has suspended that tariff until March 29, 2008.

In its application, AmerenUE seeks to establish its ISRS rate schedule to reflect costs incurred in connection with ISRS-eligible infrastructure system replacements placed in service from October 1, 2006, through October 31, 2007. The specific infrastructure system replacements for which AmerenUE seeks ISRS recognition are set forth in Appendix A to its application.

Section 393.1015.1(2), RSMo, requires the Commission to publish notice of AmerenUE's ISRS filing. Therefore, on December 3, the Commission directed that notice of the filing be mailed to the county commission of the counties served by AmerenUE. It also directed that notice be given to the media serving the area served by AmerenUE and to the members of the General Assembly representing that area. In addition, the Commission directed notice to each party in AmerenUE's most recent gas rate case. In the same order, the Commission directed that any person wishing to intervene in this matter file an application to

intervene no later than December 24. No applications to intervene were received.

Section 393.1015.2(2), RSMo, allows the Staff of the Commission to file a report regarding AmerenUE's ISRS petition no later than 60 days after it was filed. Staff filed its recommendation on January 29, 2008, advising the Commission to approve AmerenUE's petition as submitted. Staff also recommended the Commission approve AmerenUE's implementing tariff effective on March 29. No party has responded to Staff's recommendation.

In connection with its ISRS application, on December 20, AmerenUE filed a request for approval of various sample notices that will inform its customers of the ISRS. The filing and approval of those notices is required by the Commission's ISRS rule, 4 CSR 240-3.265(9). Staff's recommendation advises the Commission to approve the submitted sample notices.

Based on AmerenUE's verified petition and Staff's recommendation regarding that petition, the Commission concludes that AmerenUE shall be permitted to collect ISRS rates in the amount requested.

IT IS ORDERED THAT:

1. Union Electric Company, d/b/a AmerenUE, is authorized to collect an Infrastructure System Replacement Surcharge sufficient to recover appropriate annual pre-tax revenues in the amount of $1,211,459.

2. The tariff filed by Union Electric Company, d/b/a AmerenUE, on November 30, 2007, and assigned tariff number YG-2008-0354, is approved, effective March 29, 2008. The tariff sheets approved are:

P.S.C. MO. No. 2

3rd Revised Sheet No. 21, Canceling 2nd Revised Sheet No. 21
1st Revised Sheet No. 34, Canceling Original Sheet No. 34

3. The customer notices submitted by Union Electric Company, d/b/a AmerenUE, on December 20, 2007, are approved.

4. This order shall become effective on March 29, 2008.

5. This case shall be closed on March 30, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.
Woodruff, Deputy Chief Regulatory Law Judge

In the Matter of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P for Authority to Implement Rate Adjustments Required By 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism

Case No. EO-2008-0216
Decided February 26, 2008

Electric §14. The Commission clarified its order approving Aquila's tariff establishing rate schedules related to Aquila's approved Fuel Adjustment Clause (FAC).

Electric §20. The Commission clarified its order approving Aquila's tariff establishing rate schedules related to Aquila's approved Fuel Adjustment Clause (FAC).

Rates §101. The Commission clarified its order approving Aquila's tariff establishing rate schedules related to Aquila's approved Fuel Adjustment Clause (FAC).

ORDER CLARIFYING ORDER APPROVING TARIFF

On February 14, 2008, the Commission issued an order approving a tariff filed by Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P, to establish rate schedules related to Aquila's approved Fuel Adjustment Clause (FAC). That order will become effective on March 1. On February 19, the Commission's Staff filed a motion asking the Commission to clarify two aspects of its order.

First, Staff points out that the Commission was imprecise in its usage of the terms "cost accumulation" and "cost recovery." Aquila's FAC provides for a period of "cost accumulation" during a six-month period that the Commission's order determined began on June 1, 2007. The FAC then allows Aquila to "recover" those costs from its ratepayers beginning on March 1, 2008, with the approval of its implementing tariff. Staff points to several occasions on which the Commission incorrectly refers to "recovery" of costs when it should have referred to "accumulation" of costs. Staff is correct and the Commission will clarify the order accordingly.

Second, Staff asks the Commission to clarify that its order approving Aquila's tariff is an interim rate adjustment order subject to true-up and prudence reviews. Aquila's FAC process and the Commission's regulations require that the FAC rate adjustments be interim, subject to true-up and prudence reviews. That was certainly the intent of the

Commission in approving the implementing tariff. The Commission will clarify the order accordingly.

IT IS ORDERED THAT:

1. Staff's Motion for Clarification of Commission Order is granted.
2. A corrected order consistent with this order of clarification is attached as Appendix A.
3. This order shall become effective on March 1, 2008.

Davis, Chm., Murray, Appling, and Jarrett, CC., concur.
Clayton, C., dissents.

Woodruff, Deputy Chief Regulatory Law Judge

*Note: Another order in this case can be found at page 65.

In the Matter of the General Rate Increase for Natural Gas Service Provided by Missouri Gas Utility, Inc.

Case No. GR-2008-0060, et al.
Decided March 20, 2008

Gas §18. The Commission concluded that Class Cost of Service and other factors demonstrated that the rate design in the unanimous agreement was just and reasonable.

Gas §19. The Commission concluded that the total revenue requirement of $878,201 increasing MGU's base rates by $301,000 was a just and reasonable requirement for MGU that is fair to both the utility and its customers.

Rates §40. The Commission concluded that the total revenue requirement of $878,201 increasing MGU's base rates by $301,000 was a just and reasonable requirement for MGU that is fair to both the utility and its customers.

Rates §108. The Commission concluded that the total revenue requirement of $878,201 increasing MGU's base rates by $301,000 was a just and reasonable requirement for MGU that is fair to both the utility and its customers. The Commission also concluded that Class Cost of Service and other factors demonstrated that the rate design in the unanimous agreement was just and reasonable.

Rates §120. The Commission concluded that Class Cost of Service and other factors demonstrated that the rate design in the unanimous agreement was just and reasonable.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND AUTHORIZING TARIFF FILING

Syllabus: This order approves the Unanimous Stipulation and Agreement executed by Missouri Gas Utility, Inc. ("MGU"), the Staff of the Missouri Public Service Commission ("Staff") and the Office of the Public Counsel ("Public Counsel") to resolve all pending issues in consolidated cases GR-2008-0060 and GR-2007-0178. The order also rejects MGU's initial tariff filing, and authorizes MGU to file tariffs in compliance with the Unanimous Stipulation and Agreement.

Procedural History

Tariff Filings

On August 29, 2007, MGU submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File No. JG-2008-0138.[1] The purpose of the filing, according to MGU, was to implement a general rate increase for natural gas service to customers in its Missouri service area.

MGU became the owner of two former municipal natural gas systems in Gallatin and Hamilton, Missouri, with the Commission's approval of a transfer of assets case, Case No. GO-2005-0120, and has been operating these two systems to provide natural gas service to Missouri customers since January 1, 2005.[2] MGU currently provides natural gas service to approximately 1024 customers located in the cities

[1] MGU was formed as a wholly owned subsidiary of Colorado Natural Gas Holdings, Inc. ("CNG") in October, 2004. MGU Exh. 1, Johnston Direct, p. 3, lines 13-22; Schedule TRJ-1. Other Subsidiaries of CNG Holdings, Inc. include: Colorado Natural Gas, Inc. (regulated); Colorado Water Utility, Inc. and Wolf Creek Energy, Inc. (non-regulated). MGU Exh. 1, Schedule TRJ-2, p. 1-2. MGU is a "gas corporation," and a "public utility" as those terms are defined in Sections 386.020(18). RSMo 2000 and 386.020(42), RSMo 2000, respectively. Consequently, MGU is subject to the jurisdiction, control and supervision of the Commission. The Commission has jurisdiction over MGU's services, activities, and rates pursuant to Section 386.250 and Chapter 393.

[2] MGU Exh. 1, Johnston Direct, p. 4, lines 1-22, p. 5, lines 1-12. The original municipal systems which now constitute MGU were constructed in 1995 and 1996. *Id*. See also, *In the Matter of the Application of Missouri Gas Utility, Inc. for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Natural Gas Service in Parts of Harrison, Daviess and Caldwell Counties, to acquire the Gallatin and Hamilton, Missouri, Natural Gas Systems, and to Encumber the Acquired Assets,* Case Number GO-2005-0120, Order Approving Stipulation and Agreement, effective December 18, 2004.

of Jamison, Gallatin, Hamilton, and Coffey, in Harrison, Caldwell and Daviess Counties, Missouri, as well as the surrounding territory.[3]

MGU has not received any increase in rates for operational costs over the rates established when it acquired its Certificate of Convenience and Necessity in December 2004 in Case Number GO-2005-0120.[4] MGU states that the proposed natural gas rates submitted in its application are designed to produce an additional $443,131 in gross annual revenues, exclusive of applicable gross receipts and sales taxes, or a 28.42% increase over existing natural gas revenues. The tariff sheets attached to MGU's pleading bore an issue date of August 29, 2007, and were proposed to become effective on September 28, 2007. Together with its proposed tariff sheets and other minimum filing requirements, MGU also filed prepared direct testimony in support of its requested rate increase.

Suspension Orders and Interventions

So the Commission would have sufficient time to study the effect of the proposed tariffs and to determine if they were just, reasonable, and in the public interest, the Commission decided that it must suspend MGU's tariff. Consequently, on September 6, 2007, the Commission suspended the effective date of the proposed tariff for 120 days plus an additional six months to allow for a hearing on the matter, or until July 26, 2008.[5] The Commission also issued notice and set a deadline for intervention requests for no later than September 26, 2007. No requests for intervention were filed.

Local Public Hearings

On October 17, 2007, MGU, on behalf of all of the parties, filed a proposed procedural schedule, which included a recommendation for the time, date and location of a local public hearing. The parties agreed to recommend one local public hearing to give MGU's customers an opportunity to respond to MGU's requested rate increase.[6] That

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[3] MGU's customer count varies in relation to new connections and disconnections and varying numbers for customer classes were noted throughout the testimony of the parties. It's most current customer count per class is as follows: General Service – 942, Commercial Service – 67, Large Volume – 14, Interruptible – 0, Transportation Service – 5. MGU Exh. 1, Johnston Direct, p. 5, lines 8-10, 21-22, p. 6, line 1, p. 9, lines 12-21, p. 10, lines 1-10, p.11, lines 5-6, p. 12, lines 15-21, p. 13, lines 1-2, p. 15, lines 1-22, p. 16, lines 1-2; Schedules TRJ-2 and TRJ-3; MGU Exh. 2, Taylor Direct, Schedule KDT, Sheet 13, 14; Staff Exh. 6, Class Cost-of-Service, Rate Design, and Miscellaneous Tariff Report, p. 7.

[4] See Footnote 2, *supra*.

[5] See Section 393.150, RSMo 2000.

[6] See *Proposed Procedural Schedule and Related Matters*, filed October 17, 2007.

hearing took place on February 11, 2008, in Gallatin, Missouri. At the hearing, the Commission received the sworn testimony of three witnesses.[7] No exhibits were offered or admitted into the record. All of the parties were given the opportunity to cross-examine the witnesses.

Test Year and True-up

The test year is a central component in the ratemaking process. A historical test year is usually used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.[8]

The parties agreed to a test year consisting of the 12 month-period that ended March 31, 2007, and further agreed to update this test year to include known and measurable changes through September 30, 2007. The parties did not believe that a true-up would be necessary, however, the Staff and Public Counsel reserved the right to alter their position regarding true-up if the situation so indicated.

The Commission found the proposed test year recommended by parties to be suitable and it was adopted by order.[9] The Commission also adopted the adjustment or update period through September 30, 2007. Because the parties had not solidified their positions regarding true-up prior to the evidentiary hearing, the Commission reserved dates for a true-up hearing.

Case Consolidation

On November 3, 2006, MGU filed a tariff sheet purporting to reflect scheduled changes in its Purchased Gas Adjustment ("PGA") factors as the result of an estimated change in the cost of natural gas for the upcoming winter season and changes in the Actual Cost Adjustment ("ACA") factor. This action was assigned Case No. GR-2007-0178. There was an attempt to settle that case; however, the parties were unable to settle and it became necessary to establish a procedural schedule.

The issue upon which the parties disagreed in Case No. GR-2008-0178 is the treatment of interest costs MGU has incurred associated with its purchase of gas storage inventory. The alternative to treating the interest costs through the ACA/PGA process is to include

[7] Transcript, Volume 2.

[8] *See State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979).

[9] See *Order Adopting Procedural Schedule and Test Year*, issued October 23, 2007, effective November 2, 2007.

those costs in base rates through the working capital adjustment. Consequently, On December 19, 2007, MGU filed a motion to consolidate GR-2007-0178 with this rate case.

Because the parties to both cases were identical (MGU, Staff and Public Counsel), and because the decisions as to these issues needed to be made in both cases with an awareness of the resulting impact, the Commission consolidated these two cases upon a finding there were related questions of law and fact. The consolidation was ordered on December 21, 2007 pursuant to Commission Rule 4 CSR 240-2.110(3). The procedural schedule was adjusted to accommodate the pre-filing of testimony with regard to the ACA/PGA issues.[10]

Unanimous Stipulation and Agreement

On March 3, 2008, prior to hearing, the parties jointly filed a Unanimous Stipulation and Agreement ("Unanimous Agreement") that purports to resolve all issues in these consolidated matters.[11] The parties also jointly recommend that the Commission accept the Unanimous Agreement as a fair compromise of their respective positions on the issues in this matter.

Annual Revenue Requirement

The Unanimous Agreement provides that MGU should be authorized to file revised tariff sheets containing new rate schedules for natural gas service designed to produce overall Missouri jurisdictional gross annual gas revenues, exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar fees or taxes, in the amount of $878,201. This represents an increase of $301,000 annually.[12]

Rate Design/Class Cost of Service

The parties agree that the revenue requirement shall be allocated to MGU's various customer classes in accordance with and consistent with the amounts set forth on Appendix B to the Unanimous Stipulation and Agreement as follows:[13]

[10] See *Order Consolidating Case and Modifying Procedural Schedule*, issued December 21, 2007.
[11] MGU Exh. 4, Unanimous Stipulation and Agreement.
[12] Appendix A of the Agreement contains revised specimen tariff sheets designed to implement the rate increase.
[13] MGU amended the originally filed Appendix B the day of hearing. See MGU Exh. 5, Revised Stipulation Appendix B.

APPENDIX B
Calculation of Each Class' Revenue Requirement

	Total	General Service	Commercial Service	Large Volume	Interruptible Service	Transport
1 Current Class Rate Revenue	$588,132	$278,938	$40,954	$122,922	$0	$145,318
2 Less: Total Other Revenue (as originally filed)	($7,917)	($7,917)				
3 Adjusted Current Revenue	$580,215	$271,021	$40,954	$122,922	$0	$145,318
4 Percentage Share of Sales Revenue per Sales Class	100.0%	62.3%	9.4%	28.3%	0.0%	
5 Settlement Transportation Revenue						$170,000
6 Revenue Requirement Increase per Settlement	**$301,000**	$172,197	$26,021	$78,100	$0	$24,682
7 Rev Req Increase to Sales Classes	$276,318	$172,197	$26,021	$78,100	$0	
8 Less: Incremental Other Revenue	($3,014)	($3,014)				
9 Revenue Target By Class	**$878,201**	**$440,204**	**$66,975**	**$201,022**	**$0**	**$170,000**
10 Percentage Increase to	51%					

Company Margin Revenue						
11 Percentage Margin Increase to Classes		61.73%	63.54%	63.54%	63.54%	16.98%
CALCULATION OF RATES						
12 Annual Bills	11,453	10,672	670	131	0	60
13 Annual Ccf Volumes	1,108,783	629,678	100,533	378,572	0	448,334
14 Current Customer Charge		$8.00	$15.00	$50.00	$125.00	$125.00
15 Current Commodity Rate/Ccf		$0.3074	$0.3074	$0.3074	$0.2700	$0.3074
16 Settlement Customer Charge		**$15.00**	**$24.53**	**$81.77**	**$204.42**	**$204.42**
17 Percentage Increase in Customer Charge		87.50%	63.54%	63.54%	63.54%	63.54%
18 Class Revenue Target	$878,201	$440,204	$66,975	$201,022	$0	$170,000
19 Less: Customer Charge Revenues		($160,080)	($16,435)	($10,710)	$0	($12,265)
20 Revenue Requirement to Collect in Commodity		$280,124	$50,539	$190,312	$0	$157,735
21 Divided by Annual Ccf		$0.4449	$0.5027	$0.5027	$0.4415	$0.5027

Volumes = Settlement Commodity Rate						
22 Percentage Increase in Commodity Rate		44.72%	63.54%	63.54%	63.54%	63.54%

The specimen tariff sheets set forth in Appendix A to the Agreement reflects the parties' agreement as to the various components of the Cost of Service, including: (1) use of transportation revenue in the amount of $170,000, deducted from the revenue requirement, in order to solve for retail sales rates; (2) an equal percentage increase in all classes' revenues for General Service, Commercial Service and Large Volume Service; (3) volume and customer count determinants per the Staff's case; a customer charge for General Service in the amount of $15, and an equal percentage increase for all other classes' rate components; and, (4) the use of the Conception, Missouri weather station for weather normalization.

The Unanimous Agreement contains numerous other provisions to resolve disputed issues between the parties, including:

MGU Prospective Accounting Changes – Capitalization of Costs

> No later than April 1, 2008, the beginning of its next fiscal year, MGU will implement more detailed time coding for MGU employees in order to provide the ability to assign time to sales and promotion efforts. All costs incurred by MGU, or allocated to it by CNG Holdings, Inc. (CNG Holdings) or other affiliated entity, in relation to promotional, demonstrating, and selling activities, the object of which is to promote or retain the use of utility services by present and prospective customers of MGU, is to be charged to expense as incurred beginning no later than April 1, 2008. MGU shall fully abide by the provisions of the Uniform System of Accounts (USOA) - Gas Corporations (4 CSR 240- 40.040), including the Gas Plant Instructions included therein. MGU shall not include in its plant in service balances any direct costs not specifically listed in section 20,043 of the USOA as

being potentially subject to capitalization and that do not otherwise meet the USOA criteria for capitalization. MGU shall not include in its plant in service balances any overhead costs that do not comply with the USOA criteria for capitalization of overhead costs in section 20,044 of the USOA. These provisions shall apply to MGU's plant accounting whether the costs are directly incurred by MGU or were allocated from CNG Holdings or other affiliated companies.

MGU Prospective Accounting Changes – Corporate Governance

As of April 1, 2008, the beginning of its next fiscal year, MGU will implement more detailed time coding for CNG Holdings employees in order to provide the ability to track corporate governance efforts. "Corporate governance" shall be defined as those activities related to maintenance of CNG Holdings current corporate structure, or those activities related to consideration of or implementation of prospective changes in CNG Holdings' corporate ownership structure. Corporate governance costs shall include any incurred costs related to investigation of or implementation of merger/acquisition/ purchase/sale opportunities affecting CNG Holdings or any of its affiliates, including MGU. All corporate governance costs incurred by CNG Holdings employees or its affiliates' employees shall be segregated and separately identified on CNG Holdings or its affiliates' books and records, and shall not be allocated to MGU for inclusion in MGU's financial statements. Any costs incurred directly by MGU employees relating to corporate governance activities shall likewise be segregated and separately identified on MGU's books and records.

MGU Prospective Accounting Changes – Regulatory Costs

Beginning no later than April 1, 2008, MGU shall include all costs incurred by it, or allocated to it by CNG Holdings or other affiliates, in connection with formal

cases before the Missouri Public Service Commission in USOA account 928, Regulatory Commission Expenses. These costs shall not be capitalized into MGU's plant in service balances.

MGU Prospective Accounting Changes – Other

Beginning no later than April 1, 2008, MGU will separately record disconnection revenues, reconnection revenues and occurrences of disconnection and reconnection on a going forward basis.

Tariff Changes

The revised specimen tariff sheets attached as Appendix A to the Agreement include the following changes from MGU's existing tariff provisions: a disconnect charge, reconnect charge and trip charge in the amount of $40 for each event; an insufficient funds charge in the amount of $30; the removal of language in existing tariff sheet number 82 that provides that labor rates are subject to change without notice; and customer deposit interest language that is consistent with Staff's preference.

Case No. GR-2007-0178

The parties assert that MGU should be ordered to adjust the ACA account balance in its next ACA filing to reflect the following adjustments and to reflect the (over)/under-recovered ACA balance as found in the Staff Recommendation filed in Case No. GR-2007-0178 on August 16, 2007:

Description	Company's ACA Balance Per Filing	Staff Adjustments	Staff Recommended ACA Balance
Beginning Balance 9/1/05	**$(35,355)**	**$(3,861)**	**$(39,216)**

Cost of Gas	**$628,142**	**$(12,482)**	**$615,660**
Recoveries	**$(654,292)**	**-----**	**$(654,292)**
Interest on Under- or (Over-)Recovery of ACA Gas Costs	**$370**	**$(692)**	**$(322)**
Company Adjustment Not in Ending Balance	**$17**	**-----**	**$17**
Ending Balance 8/31/06	**$(61,118)**	**$(17,035)**	**$(78,153)**

Class Cost of Service Study

At the time it files its next general or small company rate case, MGU will provide to Staff and Public Counsel the items the parties need to perform a class cost of service study as identified in Appendix C of the Unanimous Agreement.

One-Time Contribution of Conservation Funds

Within thirty (30) days after the effective date of new rates resulting from this case, MGU will make a one-time contribution in the amount of $3,717 to Green Hill Community Action Agency in order to promote conservation of natural gas usage. Public Counsel and Staff agree to not file any pleading seeking the right to pursue penalties against MGU for issues related to non-sufficient funds charges or disconnect and/or reconnect charges as referenced in the Direct Testimony of Public Counsel witness Barbara A. Meisenheimer, submitted January 18, 2008, at pages 3 through 7, line 7, only for the time period referenced (i.e. 2005 through the date of filing the pending rate increase application).

Annual Contribution of Conservation Funds

> On an annual basis, MGU will either make a contribution in the amount of $9,000 to Green Hill Community Action Agency in order to promote conservation of natural gas usage for natural gas space heating customers or spend a like amount through a Commission-approved program for the same purpose.

Rate Case Moratorium

> Each of the Parties agrees that before April 1, 2011, it will not file any tariff or pleading with the Commission, or encourage or assist in the filing of any tariff or pleading with the Commission, which tariff or pleading seeks a general increase or decrease in the base rates of MGU unless a significant, unusual event that has a major impact on the Company occurs, including but not limited to: (i) terrorist activity or an act of God; (ii) a significant change in federal or state tax laws; or, (iii) a significant change in federal or state utility or environmental laws or regulations.

Contingent Waiver of Rights

> Unless otherwise explicitly provided herein, none of the Parties to this Stipulation and Agreement shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation or revenue-related methodology.

The parties further agreed that if Commission accepts the specific terms of the Agreement without condition or modification, they would waive their respective rights to: (1) present oral argument and written briefs pursuant to Section 536.080.1; (2) the reading of the transcript by the Commission pursuant to RSMo Section 536.080.2; (3)

seek rehearing, pursuant to Section 536.500; and, (4) judicial review pursuant to Section 386.510.[14]

Stipulation Hearing

On March 19, 2008, the Commission convened a hearing to receive evidence from the parties and their subject matter experts on the Unanimous Agreement. At the hearing, the Commission received into evidence prefiled testimony from eight witnesses, as well as, Staff's Cost of Service Report, Staff's Accounting Schedules, Staff's Class Cost of Service, Rate Design and Miscellaneous Tariff Report, Staff's Errata and Suggestions in Support of the Unanimous Stipulation and Agreement, Staff's Table on Residential Customer Impact, and MGU's Revised Stipulation Appendix B. Additionally, the Commission directed specific questions regarding the Agreement to the parties' counsel and to their subject matter witnesses. The responsive comments and testimony appear in Volume 4 of the official transcript.

Rate Making Standards and Practices

The Commission is vested with the state's police power to set "just and reasonable"
rates for public utility services,[15] subject to judicial review of the question of reasonableness.[16] A "just and reasonable" rate is one that is fair to both the utility and its customers;[17] it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."[18] In 1925, the Missouri Supreme Court stated:[19]

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[14] All statutory references throughout this order are to RSMo 2000 unless otherwise noted.

[15] Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission.
Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

[16] *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd,* 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd,* 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

[17] *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

[18] *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

[19] *Id.*

> The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.[20] "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."[21] However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.[22] "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."[23]

The Commission has exclusive jurisdiction to establish public utility rates,[24] and the rates it sets have the force and effect of law.[25] A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;[26] neither can a public utility change its rates without first seeking authority from the Commission.[27] A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's.[28] Thus, "[r]atemaking is a balancing process."[29]

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[20] *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).
[21] *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).
[22] *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).
[23] *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).
[24] *May Dep't Stores*, *supra,* 107 S.W.2d at 57.
[25] *Utility Consumers Council*, *supra*, 585 S.W.2d at 49.
[26] *Id.*
[27] *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).
[28] *May Dep't Stores*, *supra,* 107 S.W.2d at 50.

Ratemaking involves two successive processes:[30] first, the determination of the "revenue requirement," that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.[31] The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.[32] The calculation of revenue requirement from these four factors is expressed in the following formula: RR = C + (V – D) R

where: RR = Revenue Requirement;
C = Prudent Operating Costs, including Depreciation Expense and Taxes;
V = Gross Value of Utility Plant in Service;
D = Accumulated Depreciation; and
R = Overall Rate of Return or Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.[33] The Public Service Commission Act vests the Commission with the

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[29] *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988).
[30] It is worth noting here that Missouri recognizes two distinct ratemaking methods: the "file-and-suspend" method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility's rates are not just and reasonable. *See Utility Consumers Council*, *supra,* 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976).
[31] *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).
[32] *Id., citing* Colton, "*Excess Capacity: Who Gets the Charge From the Power Plant*?," 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).
[33] *See St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, *supra.*

necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.230 authorizes the Commission to value the property of every gas corporation operating in Missouri, that is, to determine the rate base. Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

The equation set out above shows that the Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital.[34] The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized.[35] The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task.[36] In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

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[34] Staff Exh. 4, Cost of Service Report, p. 10. “From a financial viewpoint, a company employs different forms of capital to support or fund the assets of the Company. Each different form of capital has a cost and these costs are weighted proportionately to fund each dollar invested in the assets. Assuming that the various forms of capital are within a reasonable balance and are valued correctly, the resulting total [Weighted Average Cost of Capital] WACC, when applied to rate base, will provide the funds necessary to service the various forms of capital. Thus, the total WACC corresponds to a fair of return for the utility company.” *Id*.

[35] Phillips, *The Regulation of Public Utilities*, *supra,* 394; Goodman, 1 *The Process of Ratemaking*, *supra,* 606.

[36] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.[37]

In the same case, the Court provided the following guidance as to the return due to equity owners:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[38]

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

> '[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[39]

<u>Legal Standard for Approving Stipulations and Agreements</u>

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[37] *Bluefield*, *supra,* 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.
[38] *Id.,* 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.
[39] *Hope Nat. Gas Co.*, *supra,* 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

The Commission has the legal authority to accept a Unanimous Stipulation and Agreement as offered by the parties as a resolution of issues raised in this case.[40]

In reviewing the agreement, the Commission notes:

> Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law.[41]
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> * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.[42] While there is no question the Commission must comply with its statutory mandates to set just and reasonable rates by determining the appropriate revenue requirement and rate design, since no proper party has requested a hearing in this case, the Commission may make its determination, and if appropriate, grant the relief requested based on the Unanimous Agreement.

As noted, no proper party requested a hearing in this matter; however, the Commission convened a hearing for the purpose of having the parties formally present the Unanimous Agreement to the Commission and for parties' counsel and the parties' subject matter experts to answer the Commission's questions regarding specific terms of the Unanimous Agreement. And while the Commission is not required to make findings of fact or conclusions of law in an order regarding a stipulation and agreement, the Commission will take note of the relevant and undisputed facts and draw appropriate legal conclusions when reaching its decision.

<u>Discussion</u>

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[40]Section 536.060, RSMo Cum. Supp. 2006. See also Commission Rule 4 CSR 240-2.115(1)(B), which states that the Commission "may resolve all or any part of a contested case on the basis of a stipulation and agreement."

[41]Section 536.090, RSMo Cum. Supp. 2006. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri,* 976 S.W.2d 485, 496 (Mo. App. 1998).

[42] *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission,* 776 S.W.2d 494, 496 (Mo. App. 1989).

Revenue Requirement

According to Staff's Direct Accounting Schedules and Class Cost of Service Summary, MGU's rate base is calculated to be $3,282,720.[43] Prior to entering into the Unanimous Agreement, Staff's proposed Rate of Return ("ROR") on rate base for MGU, once up-dated through September 30, 2007 ranged as follows: 7.84 (Return on Equity ("ROE") of 8.80), 7.97% (ROE 9.05%) and 8.11% (ROE of 9.30%).[44] Staff based its recommendation on the common equity cost upon the use of the Discounted Cash Flow ("DCF") Model as its primary methodology, but also used Capital Asset Pricing Model ("CAPM") to test the reasonableness of its DCF results.[45] Staff began by reviewing 14 market-trade natural gas distribution utility companies monitored by the financial service firm Edward Jones, but eventually applied its methodology to seven of these companies to estimate a proxy group cost of common equity to be applied to MGU's operations.[46]

Staff's calculations utilizing its recommended ROR on their calculated rate base resulted in a recommendation for the Commission

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[43] Staff Exh. 5, Direct Accounting Schedules, Schedule 2.

[44] Staff Exh. 4, Staff Cost of Service Report, pp. 4-20, Schedules 18; Staff Exh. 5, Direct Accounting Schedules, Schedule 1.

[45] Staff Exh. 4, Staff Cost of Service Report, pp. 11-20 and accompanying schedules. The annual form of the **DCF method** of calculating a fair return on common equity can be expressed algebraically by this equation:

$$\mathbf{k = D_1/P_S + g}$$

where: k is the cost of equity;
g is the constant annual growth rate of earnings, dividends and book value per share;
D_1 is the expected next period annual dividend; and
P_S is the current price of the stock.

The **CAPM** describes the relationship between a security's investment risk and its market rate of return. This relationship identifies the rate of return that investors expect a security to earn so that its market return is comparable with the market returns earned by other securities that have similar risk. The general form of the CAPM is as follows:

$$\mathbf{k = Rf + \beta\ (Rm - Rf)}$$

where: k = the expected return on equity for a specific security;
Rf = the risk-free rate;
β = beta; and
$Rm - Rf$ = the market risk premium.

Staff Exh. 4, Staff Cost of Service Report, pp. 11-20, Appendix 1, Attachments D and E; See *also In re Missouri American Water Co.* 2007 WL 4386054, Mo.P.S.C., October 4, 2007.

[46] Staff Exh. 4, Staff Cost of Service Report, pp. 11-20 and accompanying schedules.

to approve a total gross annual increase in revenue requirement for MGU ranging from $206,838 to $222,185.[47] Staff gave the Commission a specific recommendation based upon their midpoint ROR of 7.97%, which produced a total gross annual increase in revenue requirement of $214, 227.[48]

Utilizing MGU's Adjusted Revenue at Current Rates, as listed in the Unanimous Agreement, i.e., $580,215, minus incremental other income of $3,014 yielding a total current class revenue of $577,201 and adding Staff's initial recommend to approve an increase in MGU's gross revenue requirement ranging from $206,838 to $222,185 produced a recommended gross revenue requirement ranging from $784,039 to 799,386.[49]

MGU's subject matter experts recommended a return on common equity range of 12.0% to 13.0% based upon the use of one common equity model, the DCF approach, which MGU adjusted for what it believed was the increased risk of holding a private security. MGU applied the results of the DCF equity model to proxy groups of fourteen publicly-traded natural gas service companies to conclude that a range of common equity cost rate should be 9.5% to 10.0% prior to quantifying a business risk adjustment. MGU made a business risk adjustment of 2.5 to 3.0% (250 to 300 basis points) to the range of indicated common equity cost rate of 9.5% to 10.0% resulting in its recommended range of business risk adjusted common equity cost rate of 12.0% to 13.0%. MGU's business risk adjustment was predicated on the belief that the company is subject to more risk because it is not publicly traded.[50]

Ultimately MGU's subject matter experts made a specific request an over-all rate of return on its rate base investment of 9.5%, which corresponds with a return to common equity of 12.00%, producing MGU's recommended annual increase in revenue requirement of

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[47] Staff Exh. 8, Errata Sheet for Oligschlaeger Direct, pre-filed March 17, 2008.
[48] Staff Exh. 5 Direct Accounting Schedules, Accounting Schedule 1; Staff Exh. 4, Staff Cost of Service Report, pp. 11-20 and accompanying schedules (17, 18); Staff Exh. 8, Errata Sheet for Oligschlaeger Direct, pre-filed March 17, 2008 Transcript, Volume 4, Testimony of Mark L. Oligschlaeger.
[49] Unanimous Stipulation and Agreement filed March 3, 2008, Appendix B; Staff Exh. 4, Staff Cost of Service Report, pp. 21-30 and accompanying schedules.
Staff Exh. 5 Direct Accounting Schedules, Accounting Schedule 2; Staff Exh. 6, Staff Class Cost of Service, Rate Design, and Miscellaneous Tariff Report, Attachment A.
[50] MGU Exh. 3, Anderson Direct, p. 3, lines 1-18, p. 4, lines 1-10, p. 18, lines 1-4.; Schedule JMA-1, p. 22.

$443,131.[51] MGU's request results in a gross annual revenue requirement of $1,055,054 based upon its own accounting schedules.[52]

While Public Counsel raised issues with regard to particular amounts to be included in MGU's rate base, Public Counsel did not advocate for, or recommend, any specific ROR, ROE or increase in gross revenue requirement.[53] Public Counsel did make specific recommendations regarding MGU's acquisition costs and rate case expenses.[54]

As listed in the Unanimous Agreement, MGU's Adjusted Revenue at Current Rates, i.e., $580,215, minus incremental other income of $3,014 yields a total current class revenue of $577,201.[55] Utilizing these calculations, the signatory parties to the Unanimous Agreement sought to establish a gross total annual revenue requirement of $878,201, requiring an increase in MGU's base rates by approximately $301,000.[56]

Prior to executing the Unanimous Agreement, the parties' subject matter experts collectively established a range for MGU's rate of return to be set in the range of 7.84% to 9.50%, and collectively established a range for MGU's return on equity to be set in the range of 8.80% to 13.00%. In the Unanimous Agreement, the parties did not specifically agree to a rate base, rate of return or return on equity, but rather developed the request for approval of a $301,000 increase in base rates based upon negotiation, compromise and assessment of the risks of litigation.[57] The revenue amounts embodied in the Unanimous

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[51] MGU Exh. 2, Taylor Direct, pp. 10-11.

[52] MGU Exh. 1, Johnston Direct, p. 15, line 9; MGU Exh. 2, Taylor Direct, and accompanying Schedule 1. It would appear that in order to generate MGU's requested revenue requirement of $1,055,054 from its requested ROR of 9.5% that MGU would be utilizing a rate base approximately $4,327,695; however, MGU's pleading indicate that MGU's calculated rate base was $4,788,670. MGU's Schedules do reveal a calculated rate base of $3,298,030 for the actual test period adjusted upward by $1,490,640 to reach the total of $4,788,670, but it is unclear to the Commission what other adjustments may have been made to reach their final request. MGU Exh. 2, Kent Direct, Schedule KDT-1. Given that the parties have filed a Unanimous Agreement, these differences are not significant. The Commission is merely attempting to establish the factual basis behind the initial proposals of the parties to determine if the Unanimous Agreement will set just and reasonable rates.

[53] OPC Exh. 1, Robertson Direct, pp. 1-22.

[54] OPC Exh. 1, Robertson Direct, pp. 15-22; Transcript Volume 4.

[55] MGU Exh. 4, Unanimous Stipulation and Agreement, Appendix B.

[56] *Id*.

[57] MGU Exh. 4, Unanimous Stipulation and Agreement; Transcript Volume 4.

Agreement are exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar taxes.[58]

In prior cases, the Commission has recognized a range of reasonableness for the return on equity as being 100 basis points, plus or minus, the national average.[59] In the present case, Staff, citing to the Regulatory Research Associates (RRA), has provided the following figures reflecting the average authorized ROE for natural gas service:[60]

> The average authorized ROE for natural gas distribution companies for 2006 was: **10.43 percent** based on 16 decisions (first quarter – 10.63 percent based on six decisions; second quarter – 10.50 percent based on two decisions; third quarter – 10.45 percent based on three decisions; fourth quarter – 10.14 percent based on five decisions).
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> The average authorized ROE for 2007 was **10.24 percent** based on 37 decisions (first quarter – 10.44 percent based on ten decisions; second quarter – 10.12 percent based on four decisions; third quarter – 10.03 percent based on eight decisions; and fourth quarter, 10.27 percent based on fifteen decisions).

Staff also provided figures on the average authorized ROR on rate base:[61]

> The average authorized ROR for natural gas utilities in 2006 was **8.20 percent** based on 16 decisions (first quarter – 8.62 percent based on six decisions; second quarter – 7.98 percent based on one decision; third

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[58] MGU Exh. 4, Unanimous Stipulation and Agreement, p. 1, paragraph 2.

[59] *In re Missouri American Water Co.* 2007 WL 4386054, Mo.P.S.C., October 4, 2007*; In re Union Elec. Co.*, 257 P.U.R.4th 259, 2007 WL 1597782, Mo.P.S.C., May 22, 2007, Case No. ER-2007-0002; *In re Aquila, Inc.*, 257 P.U.R.4th 424, 2007 WL 1663103, Mo.P.S.C., May 17, 2007, Case No. ER-2007-0004; *In re Aquila, Inc.*, 2007 WL 2284480, Mo.P.S.C., May 17, 2007, Case No. ER-2007-0004; *In re Kansas City Power & Light Co.*, 2007 WL 750149, Mo.P.S.C., Jan 18, 2007, Case No. ER-2006-0314; *In re Empire Dist. Elec. Co.*, 2006 WL 3848081, Mo.P.S.C., Dec 21, 2006, Case No. ER-2006-0315; *In re Kansas City Power & Light Co.*, 2006 WL 4041675, Mo.P.S.C., Dec 21, 2006, Case No. ER-2006-0314.

[60] Staff's subject matter expert David Murray provided Staff's analysis on the Cost of Common Equity. Staff Exh. 4 pp. 11-20.

[61] *Id*.

> quarter – 8.15 percent based on three decisions; fourth quarter – 7.83 percent based on six decisions).
>
> The average authorized ROR for natural gas utilities for 2007 was **8.12 percent** based on 32 decisions (first quarter – 8.40 percent based on ten decisions; second quarter – 8.32 percent based on three decisions; third quarter – 7.88 percent based on seven decisions; fourth quarter – 7.97 percent based on 12 decisions).

Utilizing the national averages, and the Commission's prior analyses to determine a zone of reasonableness, the Commission determines that a reasonable ROE for MGU should fall between the range of 9.24% and 11.24% with an average midpoint of 10.24%.[62] This zone is slightly below the collective range advocated by the parties for ROE, prior to executing the Unanimous Agreement.

Rate Design

Based upon the Cost Class of Service Study ("CCOS") it conducted, Staff recommended that the revenue collected from each of MGU's rate classes be increased equally by the overall percentage increase in non-gas revenues coming out of this rate case.[63] Public Counsel did not prepare an independent CCOS Study, citing MGU's not having prepared its own CCOS Study.[64] Public Counsel argued that the status quo should be maintained in regard to rate design and that any change in total company revenue requirement be implemented as an equal percentage change to the current revenues of each customer class.[65] MGU did not conduct a CCOS Study because "the system still has less than 1,000 customers and the Company believes that although a fully distributed class cost of service study is philosophically appropriate, such an effort should be postponed until the system is larger and better able to enjoy economies of larger scale operation."[66]

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[62] Depending on the Capital Structure utilized, the ROR for MGU theoretically would fall approximately between the rage of 8.08% and 9.12%, with a midpoint of 8.60%. See Staff Exh. 4 Cost of Service Report, Schedule 18.

[63] Staff Exh. 6, Staff Class Cost of Service, Rate Design, and Miscellaneous Tariff Report, pp. 1-15, and Attachment A; Transcript Volume 4. Staff recommended using the Straight Fixed-Variable mechanism as the appropriate rate design for MGU's General Service Class. *Id.* at p. 8.

[64] OPC Exh. 2, Meisenheimer Direct, p. 2, lines 13-18.

[65] OPC Exh. 2, Meisenheimer Direct, pp. 1-4.

[66] MGU Exh. 2, Taylor Direct, p. 11, lines 5-8.

The signatory parties to the Unanimous Agreement agreed that in terms of rate design the increase in revenue requirement will be reflected as an equal percentage increase in all classes' revenues for General Service, Commercial Service and Large Volume Service.[67] The signatory parties to the Unanimous Agreement further agreed to using Staff's volume and customer count determinants, a customer charge for General Service in the amount of $15, an equal percentage increase for all other classes' rate components, and the use of the Conception, Missouri weather stations for weather normalization.[68]

Miscellaneous Issues Addressed by the Unanimous Agreement

The Unanimous Agreement contains several additional items that the Commission must address. These items include the following: (1) MGU Prospective Accounting Changes – Capitalization of Costs; (2) MGU Prospective Accounting Changes – Corporate Governance; (3) MGU Prospective Accounting Changes – Regulatory Costs; (4) MGU Prospective Accounting Changes – Other; (5) Tariff Changes; (6) Case No. GR-2007-0178 – Consolidated PGA/ACA Case; (7) Class Cost of Service Study: (8) One-Time Contribution of Conservation Funds; (9) Annual Contribution of Conservation Funds; (10) Rate Case Moratorium; and (11) Contingent Waiver of Rights.[69] Staff's Suggestions in Support of the Unanimous Agreement addressed a number of these specific issues, as did the testimony of the parties at the Stipulation Hearing.

Staff's Suggestions in Support of the Unanimous Agreement

On March 17, 2008, Staff filed suggestions in support of the Unanimous Agreement. In its suggestions, Staff noted that MGU appeared to be deviating from the requirements of the Uniform System of Accounts ("USOA") in some of its books, records and accounting methods.[70] Staff stated that MGU's accounting practices had the overall

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[67] MGU Exh. 4, Unanimous Stipulation and Agreement, p. 2, paragraph 3. Transcript, Volume 4.

[68] *Id*.

[69] MGU Exh. 4, Unanimous Stipulation and Agreement and the section of this order outlining these provisions for the full text of these provisions. Note: The parties may have had differing positions on these issues with their initial filing of testimony, however, the issues as presented in the Unanimous Agreement reflect the parties' terms of settlement on these issues. See MGU Exh. 2, Taylor Direct; Staff Exh. 1, Oligschaeger Direct; Staff Exh. 2, Direct Testimony of Thomas M. Imhoff; OPC Exh. 3, Direct Testimony of Barbara S. Meisenheimer, filed January 18, 2008. See Staff Exh. 3, Sommerer Direct, articulating Staff's position on Case No. GR-2007-0178, the PGA/ACA issues.

[70] Commission Rule 4 CSR 240-40.040 requires all gas companies under the Commission's jurisdiction to keep all accounts in conformity with the USOA.

effect of overstating MGU's plant in service balances, and hence its rate base, and understating its operating expenses, hence overstating its book net income. Staff's adjustments, however, had the effect of increasing MGU's overall revenue requirement compared to the level produced under MGU's accounting practices. Staff further represented that prior to executing the Unanimous Agreement, MGU's accounting practices would be fully consistent with the USOA and that the language used in the Unanimous Agreement accomplishes this to Staff's satisfaction.

Staff stated that it was willing to negotiate on MGU's revenue requirement related to its perception of the litigation risk inherent in the taking the issues in this matter to the hearing process and that the revenue requirement agreed to in the Unanimous Agreement is based upon a proper accounting of MGU's capital costs and operating costs. And, finally, with regard to other issues resolved by the Unanimous Agreement, Staff asserts that: (1) MGU's gas storage inventory issues from consolidated case No. GR-2007-0178 were resolved by adoption of the Staff's position in this case; (2) Staff supports the rate case moratorium adopted; (3) Staff supports the rate design advocated as well as the miscellaneous tariff revisions; and, (4) the annual conservation contribution from MGU will help low-income/high-use customers.

Conclusions

This case illustrates one of the most important public policy questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers, especially those with fixed or low incomes, and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have an opportunity to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?[71] As already noted, both of these objectives are statutory duties of this Commission.

In this case, the record reflects that MGU has not received any increase in rates for operational costs over the rates established when it acquired its Certificate of Convenience and Necessity in December 2004 in Case Number GO-2005-0120. As part of the order approving the Stipulation and Agreement in that case, the Commission's Staff was directed to perform an audit of the company. The results from

[71] *See generally*, Section 386.610, RSMo 2000.

that audit were filed with the Commission on February 15, 2006. Significantly, the Staff audit found:

> 4. Staff's audit of MGU shows that the Company is under-earning by approximately $60,000 based upon a rate base of approximately $2.57 million and a rate of return of 5.66% (return on equity of 10.50%). Staff's audit results are based upon the capital structure and debt cost rates of total company CNG. If MGU specific information was used to develop the rate of return in this revenue requirement calculation, then the indicated amount of MGU's under-earnings would be significantly greater than $60,000.

Furthermore, the record shows that MGU has experienced increases in net utility investments of approximately $1.7 million.[72]

The record further reflects that the proposed settlement in this case would reduce MGU's original request substantially. The new revenues contemplated by the settlement would result in the average residential bill increasing as follows:[73]

Residential Customer Impact on total Bill at Various Usage Levels Includes Gas Costs at Current PGA				
	Current	Proposed	Change	Percentage Increase
Customer Charge	$8.00	$15.00	$7.00	87.5%
Commodity Rate/Ccf	$0.3074	$0.4449	$0.01375	44.7%
Purchased Gas (PGA)/Ccf	$0.7039	$0.7039	$0	0.0%
Annual Usage	Annual Total Bill Current	Proposed	Dollar Increase	Percentage Increase

[72] Transcript, Volume 4, Testimony of Timothy R. Johnson.

[73] Staff Exh. 10. The General Services class includes all residential customers and non residential customers who use less than 3,000 Ccf annually. The average annual usage/GS customer is 697 Ccf. After normalization for customer growth and weather, the GS class has 889 customers and current revenues of $278,938. This means an average customer in this class is currently paying $314.00 annually for MGU's natural gas service. Staff Exh. 6, Class Cost-of-Service, Rate Design, and Miscellaneous Tariff Report, p. 7.

0	$96.00	$180.00	$84.00	87.5%
100	$197.13	$292.88	$97.75	49.6%
200	$298.26	$409.76	$111.50	37.4%
300	$399.39	$524.64	$125.25	31.4%
400	$500.52	$639.52	$139.00	27.8%
500	$601.65	$754.40	$152.75	25.4%
600	$702.78	$869.28	$166.50	23.7%
700	$803.91	$984.16	$180.25	22.4%
800	$905.04	$1,099.04	$194.00	21.4%
900	$1,006.17	$1,213.92	$207.75	20.6%
1000	$1,107.30	$1,328.80	$221.50	20.0%
1100	$1,208.43	$1,443.68	$235.25	19.5%
1200	$1,309.56	$1,558.56	$249.00	19.0%
1300	$1,410.69	$1,673.44	$262.75	18.6%
Current Tariff Effective December 30, 2004 / Current PGA Effective November 20, 2007				

The Commission recognizes that this is not a trivial amount of money to customers like those who testified at the public hearings. The increased cost of all utilities along with the rise in recent years of natural gas prices, gasoline prices, and healthcare costs have had an effect on those customers' ability to keep current on their bills.

The Unanimous Agreement resulted from extensive negotiations between parties with diverse interests and the Commission's neutral Staff. A Local Public Hearing was held to receive public comment on the proposed rate increases.[74] Subject matter experts testified as to the reasonableness of the Unanimous Agreement and all of its elements.[75] The parties agreed that the rates set out in the specimen tariff sheets attached to the Unanimous Agreement are just and reasonable.[76]

The Commission further notes that no party to this action has objected to the annual revenue requirement, or to any component of any calculations, negotiations or compromise resulting in the annual revenue requirement as set forth in the Unanimous Agreement. [77] No party has objected to the use of Staff's volume and customer count determinants or to any Class Cost of Service allocation factors or any other billing

[74] See Procedural History section of this Order. See also Transcript, Volume 2.
[75] Transcript, Volume 4.
[76] Transcript, Volume 4.
[77] Unanimous Stipulation and Agreement filed March 3, 2008; Transcript, Volume 4.

determinants utilized for the purpose of determining rate design in the Unanimous Agreement.[78] No party objected to any component of any calculations, negotiations or compromise resulting in determining the rate design as set forth in the Unanimous Agreement. No party has objected to the miscellaneous tariff provisions, or to any component of any calculations, negotiations or compromise resulting in determining the miscellaneous tariff provisions as set forth in the Unanimous Agreement.

Additionally, no party requested a hearing on any issue related to the determination of the annual revenue requirement, rate design, or the miscellaneous tariff provisions as set forth in the Unanimous Agreement.

Revenue Requirement

MGU has compromised on its requested revenue requirement by entering into the Unanimous Agreement and recommending to the Commission that its authorized revenue requirement in this case represents an increase of $301,000 in revenues associated with its natural gas service. This recommendation is joined by Staff, and Public Counsel. No party has contested this revenue requirement or demonstrated any inefficiency or improvidence on the part of MGU to challenge the justification of this increase in its revenue requirement.[79] MGU has also agreed to a rate increase moratorium for three years.

The Commission concludes that the total revenue requirement of $878,201 increasing MGU's base rates by $301,000, is a just and reasonable revenue requirement for MGU that is fair to both the utility and its customers. While the parties to the Agreement have not articulated, or specifically agreed upon a rate base, rate of return or return on equity, it is clear that the annual revenue requirement agreed to by all of the parties could only be derived by use of a rate of return on a rate base that would fall squarely within the zone of reasonableness as previously determined by the Commission.

This revenue requirement is concluded to be no more than is sufficient to keep MGU's utility plants in proper repair for effective public service, and insure to MGU's investors a reasonable return upon funds invested. The Commission shall approve the Unanimous Agreement as to MGU's annual revenue requirement, in all respects, as encompassed in the Unanimous Agreement.

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[78] Transcript, Volume 4.

[79] As noted earlier in this order, any parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent.

Rate Design

No party opposed the rate design as articulated in Unanimous Agreement. The parties' unanimous agreement to, Class Cost of Service volume and customer count determinants and all other allocation factors and billing determinants demonstrates to the Commission that this portion of rate design is just and reasonable. The Commission shall approve the Unaimous Agreement as to rate design, in all respects, as encompassed in the Unanimous Agreement.

Miscellaneous Tariff Provisions

After reviewing the remainder of the items encompassed in the Unanimous Agreement, as outlined above, and the parties' and public's positions on, or lack of position on, those items, the Commission finds the proposed items to be reasonable as adjunctive provisions of the Unanimous Agreement. These remaining items proposed in the Unanimous Agreement, as previously outlined, are acceptable to all concerned parties as evidenced by these parties being signatories to the Unanimous Agreement and having not objected to these items.[80] The Commission shall approve all of the miscellaneous tariff provisions as encompassed in the Unanimous Agreement.

Final Decision

Based on the agreement of the parties, the testimony received at the local public hearing, the testimony of the parties, and the comments and positions presented at the stipulation hearing, the Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. In addition, MGU's contributions to promote the conservation of natural gas enhance MGU's current programs, which the Commission believes is also in the public interest. Accordingly, the revisions set out in the specimen tariff sheets attached to the Unanimous Stipulation and Agreement, as amended, are just and reasonable. The Commission shall authorize MGU to file tariffs in compliance with the Unanimous Agreement. The parties shall be directed to comply with the terms of the Unanimous Agreement.

At the Stipulation Hearing the parties agreed that if the Commission found it appropriate to issue an order approving the Unanimous Agreement, it could be issued with an effective date of March

[80] MGU Exh. 4, Unanimous Stipulation and Agreement.

24, 2008 without objection. The parties also echoed the request in the Unanimous Agreement that MGU's rate increase be implemented on an expedited basis. Good cause exists for expedited action because the company was under-earning from its inception, and continues to under-earn.

The revised tariff sheets to be filed shall be marked with an effective date which is at least 30 days past the issue date. However, MGU has already moved for expedited treatment of its compliance tariffs and the Commission finds good cause to make an expeditious determination on those tariffs because of MGU's under-earnings. Consequently, if the tariffs are found to be in compliance when they are filed, the Commission will approve those tariffs setting an effective date as soon as practical without the need for a further motion for expedited treatment.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed on March 3, 2008, is hereby approved as the resolution of all issues in consolidated cases GR-2007-0178 and GR-2008-0060. A copy of the Unanimous Stipulation and Agreement is attached to this order.

2. The signatories to the Unanimous Stipulation and Agreement, are ordered to comply with the terms of the Agreement.

3. The proposed gas service tariff sheets (JG-2008-0138) submitted on August 29, 2007, by Missouri Gas Utility, Inc. for the purpose of increasing rates for gas service to retail customers are hereby rejected.

4. The specific tariff sheets rejected are:

P.S.C. Mo. No. 1

First Revised Sheet No. 5, Cancelling Original Sheet No. 5
First Revised Sheet No. 9, Cancelling Original Sheet No. 9
First Revised Sheet No. 10, Cancelling Original Sheet No. 10
First Revised Sheet No. 11, Cancelling Original Sheet No. 11
First Revised Sheet No. 12, Cancelling Original Sheet No. 12
First Revised Sheet No. 13, Cancelling Original Sheet No. 13
First Revised Sheet No. 15, Cancelling Original Sheet No. 15
First Revised Sheet No. 16, Cancelling Original Sheet No. 16
First Revised Sheet No. 17, Cancelling Original Sheet No. 17
First Revised Sheet No. 19, Cancelling Original Sheet No. 19
First Revised Sheet No. 20, Cancelling Original Sheet No. 20
First Revised Sheet No. 21, Cancelling Original Sheet No. 21
First Revised Sheet No. 24, Cancelling Original Sheet No. 24

Third Revised Sheet No. 51, Cancelling Second Revised Sheet No. 51
First Revised Sheet No. 53, Cancelling Original Sheet No. 53
Original Sheet No. 53A
First Revised Sheet No. 54, Cancelling Original Sheet No. 54
First Revised Sheet No. 55, Cancelling Original Sheet No. 55
First Revised Sheet No. 82, Cancelling Original Sheet No. 82

5. Missouri Gas Utility, Inc. is authorized to file tariffs in compliance with the terms of the Unanimous Stipulation and Agreement.

6. Tariffs filed in accordance with Ordered Paragraph #5 shall be filed with an effective date which is at least 30 days after its issue date; however, if such tariffs are in compliance with the Unanimous Stipulation and Agreement, the Commission will approve those tariffs setting an effective date as soon as practical without the need for a further motion for expedited treatment.

7. MGU shall adjust the Actual Cost Adjustment account balance in its next Actual Cost Adjustment filing to reflect the adjustments embodied in the Unanimous Stipulation and Agreement and reflect the (over)/under-recovered Actual Cost Adjustment balance as found in the Staff Recommendation filed in Case No. GR-2007-0178 on August 16, 2007.

8. The procedural schedule adopted by the Commission on October 23, 2007, and subsequently modified on December 21, 2007 and February 20, 2008, that was suspended on March 4, 2008, is hereby canceled.

9. Based upon the parties' agreement, this order shall become effective on March 24, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Stearley, Regulatory Law Judge

***Note:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

Socket Telecom, LLC, Complainant, v. CenturyTel of Missouri, LLC d/b/a CenturyTel and Spectra Communications Group, LLC, d/b/a CenturyTel, Respondents.

Case No. TC-2007-0341
Decided March 26, 2008

Telecommunications §38. The Commission concluded that even though CenturyTel was not required by Federal law to fulfill the number port orders specifically at issue in this case, CenturyTel's interconnection agreements with Socket as interpreted by industry guidelines required CenturyTel to port these numbers. The Commission also concluded that network capacity issues were not grounds to deny porting requests.

Telecommunications §46. The Commission concluded that even though CenturyTel was not required by Federal law to fulfill the number port orders specifically at issue in this case, CenturyTel's interconnection agreements with Socket as interpreted by industry guidelines required CenturyTel to port these numbers.

Appearances

Carl J. Lumley, , Curtis, Oetting, Heinz, Garrett & O'Keefe, 130 South Bemiston, Suite 200, Clayton, Missouri 63105-1913, for Socket Telecom, LLC.

Charles Brent Stewart, Stewart & Keevil, 4630 John Garry Drive, Suite 11, Columbia, Missouri 65203, for CenturyTel of Missouri, LLC, d/b/a CenturyTel, and Spectra Communications Group, LLC, d/b/a CenturyTel.

Larry W. Dority, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for CenturyTel of Missouri, LLC, d/b/a CenturyTel, and Spectra Communications Group, LLC, d/b/a CenturyTel.

William K. Haas, Deputy General Counsel, General Counsel, Missouri Public Service commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin.

REPORT AND ORDER

Procedural History

On March 19, 2007, Socket Telecom, LLC filed a complaint against CenturyTel of Missouri, LLC, d/b/a CenturyTel and Spectra Communications Group, LLC, d/b/a CenturyTel.[1] In that complaint, Socket alleged that CenturyTel failed to port two numbers in the Willow Springs exchange, and a number in the Ellsinore exchange, as required by federal law and by the parties' interconnection agreement. CenturyTel denies Socket's allegations, stating that neither federal law nor the agreements require the type of porting that Socket requests. Both parties filed motions for summary determination. The Commission held a hearing on July 11-12, 2007.

Findings of Fact

Socket is a certificated competitive local exchange company in the State of Missouri. Socket is a Missouri limited liability company in good standing, with its principal place of business located at 2703 Clark Avenue, Columbia, Missouri 65202. Socket is an authorized provider of intrastate switched and nonswitched local exchange and interexchange telecommunications services in Missouri under certificates granted and tariffs approved by the Commission. Socket is also an authorized provider of interstate telecommunications services in Missouri under the jurisdiction of the Federal Communications Commission.

Socket is a facilities-based competitive local exchange carrier and interexchange carrier. At present Socket operates in exchanges served by AT&T f/k/a SBC, CenturyTel, and Embarq f/k/a Sprint, providing voice and data services to small and medium-sized business customers primarily in rural areas of the state. In providing these services, Socket uses its own switching and transport facilities as well as transport facilities and loops leased from other companies. Socket also provides telecommunications services to Internet Service Providers, including both its' affiliate, Socket Internet,[2] as well as unaffiliated Internet Service Providers. Socket is currently researching

[1] CenturyTel and Spectra are separate corporations and separate respondents, with separate interconnection agreements with Socket. For brevity's sake, however, this order will refer to the respondents as "CenturyTel".

[2] Socket Telecom is owned by Socket Holdings Corporation which does business under the name Socket Internet.

and testing products and services that will allow it to expand into the residential market.[3]

The two CenturyTel entities are Spectra Communications Group, LLC d/b/a CenturyTel ("CenturyTel – Spectra") and CenturyTel of Missouri, LLC ("CenturyTel – Missouri") collectively referred to as CenturyTel Operating Companies ("CTOC" or "CenturyTel"). Each is a wholly owned subsidiary of CenturyTel, Inc. Each entity obtained its franchise territory by purchasing assets from GTE Midwest, Inc. and its successor Verizon Midwest, Inc. in two separate transactions. Together, their Missouri franchise territory represents the territory originally served by GTE Midwest, Inc. Collectively, these entities serve nearly a half-million access lines in Missouri. Socket has separate but identical (other than incumbent name) interconnection agreements (ICAs) with each of them that were arrived at through the arbitration in Case No. TO-2005-0299 and approved by this Commission on or about October 13, 2006.[4]

CenturyTel of Missouri, LLC d/b/a CenturyTel is a limited liability company organized and existing under the laws of the State of Louisiana and authorized to conduct business in the State of Missouri. It is a public utility subject to the jurisdiction of the Commission and provides telecommunications services in its service areas within the State of Missouri under authority granted and tariffs approved by the Commission. It is an incumbent local exchange carrier as defined in Section 251(h) of the Telecommunications Act of 1996 and a noncompetitive large local exchange carrier as defined in Sections 386.020, 392.361, and 392.245, RSMo. CenturyTel's principal place of business is located at 100 CenturyTel Drive, Monroe, Louisiana 71203, and it has local offices at 220 Monroe Street, 1st Floor, Jefferson City, Missouri 65101.[5]

Spectra Communication Group, LLC d/b/a CenturyTel is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. It is a public utility subject to the jurisdiction of the Commission and provides telecommunications services in its service areas within the State of Missouri under authority granted and tariffs approved by the Commission. It is an incumbent local exchange carrier as defined in

[3] Ex. 1, pp. 3-4.
[4] *Id.* at 4.
[5] *Id.* at 5.

Section 251(h) of the Telecommunications Act of 1996 and a noncompetitive large local exchange carrier as defined in Sections 386.020, 392.361, and 392.245, RSMo. Spectra's principal place of business is located at 100 CenturyTel Drive, Monroe, Louisiana 71203, and it has local offices at 220 Monroe Street, 1st Floor, Jefferson City, Missouri 65101.

Socket asks the Commission to require CenturyTel to port numbers so that customers can both be served by their provider of choice and retain their telephone number. The customers in question want to change providers from CenturyTel to Socket, keep their telephone numbers, and obtain from Socket a form of foreign exchange service, also known as VNXX service, so that they can make and receive calls rated as local to the same rate center as when they were obtaining service from CenturyTel with those telephone numbers (i.e., their location on the network does not change), even though their place of business has geographically moved from one exchange to another.

Socket Telecom's affiliate, Socket Internet, wants to port two Willow Springs numbers that are used for local internet dial-up access and technical support so it can be served by Socket Telecom. Computer Magic wants to port Jamestown, Prairie Home, and Wooldridge numbers and use Socket Telecom services.[6] Poplar Bluff Internet wants to port Lesterville,[7] Ellsinore[8] and Boss numbers and use Socket services. Mississippi Valley Internet wants to port Paris, Clarence,[9] LaPlata, and Macon numbers and use Socket services. MCM Systems wants to port Hunnewell, Shelbyville, Santa Fe, Shelbina, Monroe City, Laddonia, Perry, and Stoutsville numbers and use Socket services. Texas County Rural Area Information Network (TRAIN) wants to port Houston, Summersville, Licking, and Cabool numbers and use Socket services.[10]

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[6] Ex. 1, pp 15, 24.

[7] CenturyTel completed the Lesterville port but then later ported it back. Ex. 1, pp. 26-28).

[8] CenturyTel did ultimately complete the Ellsinore port, but still contends that it should not have done so. (Ex. 1, p. 23).

[9] CenturyTel told Socket it would not complete the Clarence port, but then did it anyway, causing an outage for the customer, and then reversed it. (Ex.1, pp. 24-25, Ex. 2, p. 37).

[10] Ex. 1, pp. 15, 22-24; Ex. 2, pp. 44-50. Willow Springs, Jamestown, Prairie Home, Wooldridge, Cabool, and Summersville are CenturyTel exchanges. Lesterville, Ellsinore, Boss, Paris, Clarence, LaPlata, Macon, Hunnewell, Shelbyville, Sante Fe, Shelbina, Monroe City, Laddonia, Perry, Stoutsville, Houston, and Licking are Spectra exchanges.

Conclusions of Law

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.[11]

This Commission has jurisdiction and authority over telecommunications companies who provide service within Missouri.[12] The Commission has jurisdiction to interpret and enforce interconnection agreements it has approved.[13]

List of Issues

Regrettably, the parties were unable to even agree on a List of Issues that the Commission should resolve. Therefore, the Commission has coalesced the parties' issues, and will resolve them below.

Issue 1: *Does federal law require CenturyTel to fulfill the number port orders specifically at issue in this case and similar orders submitted since the filing of the complaint and into the future?*

Findings of Fact

There are no additional findings of fact for this issue.

Conclusions of Law

All local exchange carriers have the statutory obligation "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission

[11] Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo. App. 2005)..

[12] Section 386.250(2), .320, .330, 392.200, .240.

[13] *Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Services*, 317 F.3d 1270 (11th Cir. 2003); *SWBT v. Connect Comm*., 225 F3d 942, 947 (8th Cir. 2000).

(FCC)."[14] Number portability is "the ability of **users** of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[15]

However, they need not provide location number portability.[16] That is "the ability of **users** of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when moving from one physical location to another**.**"[17]

The FCC has issued a number of decisions respecting number portability. In its First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability* ("First Order"), the FCC required all carriers to provide "service provider portability", which it made synonymous with the statutory definition of "number portability". It also expanded the number portability obligation to porting between wireline and wireless carriers ("intermodal portability").[18] In this order, the FCC specifically declined to mandate "location portability" between wireline carriers.[19]

The FCC in its Second Report and Order, *Telephone Number Portability* ("Second Order")[20], and in related subsequent proceedings, again considered wireline to wireline portability but once again decided not to change the definition of "location portability" nor require "location portability" among wireline carriers, even within the same exchange area.[21]

In 2003, the FCC issued its *Intermodal Order*[22] wherein it mandated number portability between *wireless and wireline* carriers. Not only did the FCC *not* mandate wireline-to-wireline "location portability" in this order, it explicitly noted "that wireline carriers are not able to port a number to another wireline carrier if the rate center [exchange]

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[14] 47 U.S.C. § 251(b)(2).
[15] 47 U.S.C. § 153(30) (emphasis added).
[16] In the Matter of Telephone Number Portability, 11 F.C.C. Rcd. 8352, 8447 (1996).
[17] 47 C.F.R. § 52.21(j) (emphasis added).
[18] 11 F.C.C.R. 8352 (1996).
[19] 11 F.C.C.R. 8352, at 8443.
[20] 12 F.C.C.R. 12, 281 (1997).
[21] FCC, RM 8535, Second Memorandum Opinion and Order on Reconsideration, Released October 20, 1998, cited in relevant part in Ex. 6, Furchtgott-Roth Rebuttal, page 11.
[22] *In the matter of Telephone Number Portability*, FCC CC Docket No. 95-116, 18 F.C.C.R. 23697 (November 10, 2003).

associated with the number does not match the rate center [exchange] associated with the customer's physical location".[23] Simply put, the *Intermodal Order* changed nothing with respect to wireline-to-wireline porting.

To date the FCC has reviewed, considered and deliberately decided not to require location portability under Section 251(b)(2) in wireline porting situations although it has reserved its prerogative to mandate it in the future under a different section of the Act:

> "The Commission concluded in the First Report and Order that the requirement that all LECs provide local number portability (i.e., service provider portability) pursuant to section 251(b)(2) does not include location portability because the Act's number portability mandate is limited to situations when users remain 'at the same location' when switching from one telecommunications carrier to another. Although we did not require LECs to provide location portability when the First Report and Order was issued, we nevertheless concluded that nothing in the Act would preclude us from mandating location portability if, in the future, we determine that location portability is in the public interest"[24]

That the FCC has not yet mandated "location portability" in the wireline-to-wireline setting is reflected in an FCC order issued as recently as June 29, 2007. The FCC actually found it necessary to waive its rules to temporarily *permit* wireline geographic number porting due to a natural disaster.[25]

Socket agrees that location portability is not required; however, it states that what it is requesting is not location portability, but number portability.[26] It states that location, in the context of the Telecommunications Act, means rate center, and that because the customers want their numbers to remain in their current rate centers, what they are requesting is number portability. So, despite the customer

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[23] *Id*., at paragraph 43. This order in paragraph 22 also limited the wireless/wireline porting obligation to only those circumstances where the wireless carrier's coverage area overlapped the geographic location of the rate center (exchange) in which the customer's wireline number is provisioned. The FCC found that this type of intermodal porting would be consistent with the requirement to port *when customers remained in the same location*.

[24] FCC, RM 8535, Second Memorandum Opinion and Order on Reconsideration, Released October 20, 1998 at paragraph 29.

[25] Ex. 16, *In the Matter of Telephone Number Portability Numbering Resources Optimization*, CC Docket No. 95-116 and CC Docket No. 99-200 (released June 29, 2007). *See*, *also* Ex. 15.

[26] Ex. 1, p. 34.

wanting to move perhaps 200 miles or more away, in Socket's view, the location does not change, because the rate center of the phone number to be ported would not change.

The question ultimately is: what does "location" mean? Courts that have examined the matter confirm that the absence of a definition of location renders the statute and rules ambiguous.[27]

Perhaps a more fundamental question is what location is being measured? Is it the location of the customer, or the location of the phone number if, indeed, a phone number even *has* a location? Because, if a phone number truly cannot have a "location", then it follows that it is the customer's, or users, location that is pertinent.

Indeed, as the Commission noted above, both Congress and the FCC refers to the **users'** location as being determinative in distinguishing between number and location portability.[28] With this in mind, the Commission can only conclude that Socket is requesting location portability. The FCC apparently believes so as well, or else it would not have concluded as recently as this year that it needed to waive location portability rules to permit carriers to port customer's numbers to remote locations in the wake of Hurricane Katrina and severe damage from tornadoes in Kansas.[29]

Decision: Federal law does not require CenturyTel to fulfill the number port orders specifically at issue in this case and similar orders submitted since the filing of the complaint and into the future. The Commission finds this issue in favor of CenturyTel.

Issue 2: *Do the Socket/CenturyTel interconnection agreements require CenturyTel to fulfill the number port orders specifically at issue in this case and similar orders submitted since the filing of the complaint and into the future?*

Findings of Fact

The next question then becomes whether CenturyTel is required to port the numbers, anyway, due to clauses in the

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[27] See *USTA v. FCC*, 400 F3d 29, 31 (DC Cir. 2005); *Central Texas Telephone Cooperative v. FCC,* 402 F3d 205, 207 (DC Cir. 2005); *In the Matter of Starnet*, 355 F3d 634, 638 (7th Cir. 2004)(location could mean rate center, end of loop, customer premise, or something else).

[28] See *United States Telecom Association v. FCC*, 400 F.3d 29, 37 (D.C. Cir. 2005)(fn. 14 – in a companion case, FCC counsel's conceded that a number really has no physical location.)

[29] See *In the Matter of Telephone Number Portability Number Resources Optimization*, CC Docket No. 95-116, 99-200 (Orders dated September 1, 2005 and June 29, 2007).

interconnection agreements requiring porting according to industry standards. In particular, Socket argues that the interconnection agreements the Commission approved in a prior arbitration case require CenturyTel to port numbers according to "industry agreed-upon practices" and "industry guidelines."[30] The parties disagree about the meaning of these sections, even though they were not imposed via arbitration, but *agreed* upon through negotiation.[31]

Telecommunications technology moves at warp speed compared to the speed at which FCC and Congress move. If the industry wants to do something more than required by federal law, it may do so; indeed, interconnection agreements are often rife with agreed-upon provisions that Congress would not force upon them. In fact, the interconnection agreements themselves state that the parties will provide permanent number portability via local routing numbers as required by the FCC **or** industry agreed-upon practices.[32] As stated above, CenturyTel and Socket *agreed* to that portion of the agreements. Thus, they apparently recognized that the industry could go beyond the requirements of the FCC in porting numbers.

Industry agreed-upon practices and guidelines call for provision of the number ports at issue in this case. AT &T, Embarq and every CLEC that Socket has dealt with "routinely" provide such number ports, as Socket does for them.[33] In addition, Socket took this issue to the industry, presenting it to the Local Number Portability Administration – Working Group (LNPA-WG).[34]

As Staff witness Voight stated: "The LNPA-WG, as a part of the NANC (North American Numbering Council), represents the closest thing to a definitive standards body that one might expect to find in the area of number portability."[35] Socket witness Kistner confirmed that view.[36] Even CenturyTel witness Penn described it as "a one-stop shop, one place to go to see what the industry has discussed in their opinion." The LNPA-WG is relied upon by "entities that do make those rules such

[30] See Commission Case No. TO-2006-0299, Notice of Filing of Conformed Agreements (filed September 15, 2006)(Art. XII, Section 3.2.1, Section 6.4.4)(hereafter referred to as the agreement or agreements).
[31] Ex. 5, p.7.
[32] See *id*., Art. XII, Sec. 3.2.1.
[33] Ex. 1, pp. 44-45; Tr. 79-81, 98-99, 132-33, 180-81.
[34] Ex. 1, p. 28.
[35] Ex. 5, p. 24; Tr. 195-96.
[36] Ex. 4, p. 11.

as the FCC and NANC."[37] Further, Mr. Penn indicated that the LNPA-WG's purpose "is to arrive at industry consensus" and that it was appropriate for Socket to present the issue to the LNPA-WG.[38] Mr. Furchtgott-Roth testified: "Whether those constitute an industry standard, I think Mr. Voight addressed this earlier, it is – it certainly is one form."[39] The LNPA-WG frequently works to resolve these types of porting disputes.[40]

The LNPA-WG reached a consensus that a port request should be worked given these agreed-upon caveats.

1. The customer would like to receive calls to their number(s) at a location of theirs that is physically outside of the Rate Center.
2. The customer understands that these numbers must continue to be rated with its current rate center and does not want them to take on the rating characteristics of the Rate Center of their new location.
3. The new service provider already serves the Rate Center out of the same switch to which they want to port this customer's number(s).
4. The new service provider's switch that already serves the Rate Center has an existing POI (Point of Interconnection) at the ILEC's tandem over which calls to these numbers are routed. If this customer's number(s) are ported into the new service provider's switch, they would be routed over the same POI, and then the new service provider would deliver the calls to the customer's premise that is located outside of the Rate Center associated with the customer's number(s).
5. The new service provider has a tariffed or publicly posted as required by state regulation foreign exchange (FX) service that would cover this situation. Calls to and from customers located in the exchange and the customer served by the new service provider will be routed exactly the same whether the new service provider assigns the customer a phone number from its

[37] Tr. 230.
[38] Ex. 8, p. 4; Ex. 9, p. 13.
[39] Tr. 218.
[40] Ex. 1, pp. 28-30; Ex. 2, pp. 26-35; Ex. 4, pp. 15-16; Tr. 52-57, 132-33.

1K block of numbers or whether the new service provider ports the numbers. This customer will be served out of the new service provider's FX tariff or publicly posted price list as required by state regulation.

6. The LSR (Local Service Request) submitted by the new service provider reflects the customer's original service location as recorded by the Old SP (Service Provider).[41]

With these caveats, the LNPA-WG concluded that such a number port order would be legitimate.[42] Socket's port requests meet all the foregoing items.[43] The Commission's order in this case is limited to the unique dispute that Socket and CenturyTel bring to the Commission to resolve, which include the above-listed caveats the LNPA-WG stated.[44]

CenturyTel seemed to implicitly attempt to argue at hearing that Socket did not meet item 3, apparently contending that Socket does not serve a rate center through its switch if it does not have loop facilities in the exchange. But Socket has NXX codes for the exchanges in question and seeks to port numbers as well.[45] Indeed, CenturyTel agrees Socket has NXX codes for every CenturyTel exchange.[46] Under Article II, Section 1.93 of the interconnection agreement, CenturyTel agreed that either opening an NXX code or porting a number constitutes "offering service" in the exchange.[47] The interconnection agreements do not require Socket to have loop facilities in the exchange to port a number.[48]

CenturyTel witness Penn, who participated in the LNPA-WG proceedings, confirmed that Mr. Kohly accurately described the outcome of that group's deliberations.[49] CenturyTel also provided such an admission in response to Staff discovery.[50] Mr. Penn also testified that it was appropriate for Socket to bring the matter to the LNPA-WG for consideration.[51] Mr. Penn did at one point try to cut too fine a line with

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[41] Ex. 2, pp. 30-31.
[42] Id., see also Tr. 52-57.
[43] Ex. 2, pp. 31-35; Tr. 194-95.
[44] Tr. 207, 208.
[45] Tr. 90.
[46] Tr. 264.
[47] Tr. 90-91.
[48] Ex. 5, p. 23.
[49] Tr. 224-26.
[50] Tr. 195.
[51] Ex. 9, p. 13.

the Commission, first stating that the Group had declined to determine whether Socket's port requests met the foregoing criteria.[52] But he then volunteered that "the caveats do support whether the LNP working group believes that a port similar in nature to what Socket has brought up would be considered legitimate port requests."[53] He added: "To the LNP working group, the LNP working group co-chair Paula Jordan, would say there is consensus on this issue, that as long as the six caveats spelled out by the LNPA working group are met, that ports such as the ones that Socket is suggesting should be considered legitimate port requests."[54]

Socket provided ample and unrefuted evidence that industry agreed-upon practices and guidelines call for provision of the number ports at issue in this case. CenturyTel argued that Embarq's practices were to not port in a situation like this.[55] However, the complete information shows that Embarq remained willing to port numbers under similar circumstances for another carrier, provided the carrier established interconnection with Embarq with one POI per LATA/tandem switch and with each party responsible for the facilities on their side of a POI.[56] In other words, Embarq's Pennsylvania testimony shows that if the CLEC interconnects on terms and conditions like Socket does with CenturyTel (at least one POI per LATA and the CLEC bearing responsibility for facilities on its side of the POI), then Embarq willingly would port the numbers.[57]

The evidence shows that CenturyTel stands alone in its refusal to make such ports.[58] Socket has proven that national incumbent carriers like AT&T and Embarq, competitive CLECs, and the LNPA-WG, a nationally recognized representative of the industry, all find the requested ports should be provided.[59] Such evidence proves that CenturyTel is required to provide the ports pursuant to the provisions of the interconnection agreements that require compliance with industry

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[52] Tr. 226.
[53] Tr. 231.
[54] Tr. 232.
[55] Ex. 12, p. 17.
[56] Tr. 285-87; Ex. 12, Sch. SS-1 Maples Direct, p. 21; Ex. 21, Fox Direct, pp. 11-12.
[57] Ex. 21, Fox Direct, p. 12.
[58] Tr. 204.
[59] CenturyTel apparently contends that it does not have to abide by the LNPA-WG action because appeals are possible. (Tr. 220, 233). However, the interconnection agreements require compliance with current industry standards and the Working Group has confirmed those standards. A potential appeal by a holdout like CenturyTel does not change current standards. CenturyTel did not offer any evidence of any "stay" of industry practices.

practices and guidelines.[60] That is the conclusion Staff "conclusively" recommended to the Commission.[61]

Conclusions of Law

Article XII (Local Number Portability – Permanent Number Portability), Section 3.2.1 of the agreement states:

> The Parties agree that the industry has established local routing number (LRN) technology as the method by which permanent number portability (PNP) will be provided in response to FCC Orders in FCC 95-116 (i.e. First Report and Order and subsequent Orders issued as of the date this Agreement was executed). As such, the Parties agree to provide PNP via LRN to each other as required by such FCC Orders or industry agreed-upon practices.

In this provision, the parties recognize that number portability (PNP) is supposed to be provided by the LRN method and agree to port numbers in compliance with FCC requirements and also in compliance with "industry agreed-upon practices." CenturyTel contends that this provision applies only to LRN porting.[62] But Staff and CenturyTel agree with Socket that ALL porting is LRN porting.[63] LRN is the established national method of handling number portability.[64] And the agreement states that the parties will provide permanent number portability (PNP) per FCC requirements and industry practices. (Article XII, Section 3.2.1).

Likewise, in Section 6.4.4, the parties agreed that: "Industry guidelines shall be followed regarding all aspects of porting numbers from one network to another." And in Section 6.4.5, the parties agreed: "Each Party shall abide by the guidelines of the North American Numbering Council (NANC) and the associated industry guidelines for provisioning and implementation processes."

Decision: The Respondents' interconnection agreements with Socket require Respondents to port these numbers.

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[60] While the LNPA-WG itself cannot compel CenturyTel to provide the ports at issue (Ex.1, p. 29), its actions dovetail with the contractual provisions that require CenturyTel to comply with such standards, such that Commission can and should enforce those provisions and compel CenturyTel to provide the ports.

[61] Ex. 5, pp. 8, 34.

[62] Tr. 38.

[63] Tr. 164, 296.

[64] *See* Second LNP Order, CC Docket 95-116, para. 8, 45 et seq (8/18/97).

Issue 3: *Are network capacity issues grounds for denial of a number port order?*

Findings of Fact

CenturyTel asserts on one hand that purported lack of capacity justifies its refusal to provide number ports[65], and yet on the other that this purported justification of its refusal to port numbers is not at issue.[66] CenturyTel refused to provide the two port requests that led to the filing of the complaint, and other subsequent port requests, on the grounds that it lacked capacity.[67]

CenturyTel's opposition to Socket's porting requests specifically boils down to dissatisfaction with the Commission's decision to accept CenturyTel's proposed contract language which **expressly allows** Socket to provide VNXX service and assign numbers to customers physically outside the calling area containing the rate center with which the number is associated, **but not** to accept CenturyTel's accompanying proposal to include in that contract language a requirement of a point of interconnection in every exchange.[68] Stripped down to its essence, CenturyTel's position is plainly untenable – it is not entitled to reconsideration of the arbitration or alteration of the provisions of the interconnection agreements, nor can it legitimately hold required number ports hostage in its effort to coerce such reconsideration/alteration from Socket. CenturyTel simply must abide by the contract terms concerning points of interconnection and capacity of interconnection facilities.[69]

Each party is continuously responsible to have sufficient capacity on its side of a point of interconnection so that traffic can be exchanged properly, including when traffic is to be added such as for the customers involved in the subject porting requests after the completion of the number ports. The interconnection agreements establish procedures for creation of additional points of direct interconnection based on actual traffic volumes, but under such contract provisions actual traffic volumes are to be determined over time after numbers are ported and are not to be estimated in anticipation of a number port.[70] When the parties

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[65] Ex. 11, pp. 14-19.
[66] Ex. 12, p. 25.
[67] Ex. 1, pp. 22-24; Ex. 2; pp. 44-48.
[68] See Arbitration Decision, p. 27-28, 44-46.
[69] Ex. 2, p. 9.
[70] Hence, Ms. Anderson's statistical studies, involving use of Erlang tables, are not relevant. (Ex. 2, p. 12). CenturyTel itself does not even act on these tables immediately. (Tr. 275).

indirectly interconnect, their respective arrangements with the third party will determine whether additional POIs are needed.

NPAC (the national portability administration center) does not allow a party to challenge a port based on capacity issues.[71] No other carrier refuses to port numbers based on capacity issues.[72] Thus, porting requests are to be handled through the porting process independent of other issues, including capacity.

Interconnection capacity has nothing to do with the technical feasibility of a port, contrary to CenturyTel witness Smith's assertions. Her testimony references FCC concerns about the overall methodology of number porting (expressed during the process by which the FCC selected LNR as the method to resolve such concerns), not specific porting requests.[73] CenturyTel is fully capable of completing the ports at issue.[74]

Interconnecting carriers are expected to cooperate so that there is always sufficient capacity for their mutual exchange of traffic. Further, the parties should rely on forecasting to avoid surprises.[75]

Conclusions of Law

The FCC has stated that "carriers may not impose non-porting related restrictions on the porting out process."[76] Likewise, it has stated that "carriers are required to port a number when they receive a valid request and may not refuse to port a number while attempting to collect fees, or settle an account, or for other reasons unrelated to validating a customer's identity."[77] Consistent with the foregoing, in the Intermodal LNP Order, the FCC indicated that disputes over transport costs and facilities were not grounds to deny porting requests.[78]

Decision: Network capacity issues are not grounds for denial of a number port order. The Commission finds this issue in favor of Socket.

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[71] Ex. 1, pp. 10, 31.
[72] Ex. 2, p. 41.
[73] Ex. 4, p. 15; Ex. 11, p. 18.
[74] Ex. 1, pp. 25-28, 33-34; Ex. 2, pp. 9, 25; Ex. 11, pp. 27-28; Tr. 144.
[75] Ex. 1, p. 17; Ex. 5, p. 30.
[76] October 2003 LNP Order, CC Docket 95-116, para. 11. Porting out and porting in refer to the actions of the two carriers executing a port. (Tr. 154-55).
[77] Id at para. 8.
[78] Intermodal LNP Order, para. 28 and n. 75.

Issue 4: *Is Socket required to have a block of numbers assigned to it for a rate center before CenturyTel has to fulfill number port orders from Socket for that rate center?*

Findings of Fact

Socket has NXX codes for every CenturyTel exchange.[79]

Conclusions of Law

Because Socket already has those codes, this issue does not affect the outcome of this case. Even Socket admits as much in its brief. Because the issue does not affect the outcome of this case, the issue is moot, and the Commission will decline to decide this issue.[80]

IT IS ORDERED THAT:

1. The Petition for Leave to File Amicus Brief filed by the Small Telephone Company Group is granted.

2. CenturyTel of Missouri, LLC shall immediately complete the pending number port orders submitted by Socket Telecom, LLC on October 30, 2006 for 573-322-8421 and on February 23, 2007 for 417-469-9090 and 417-469-4900 in coordination with Socket Telecom, LLC.

3. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC d/b/a CenturyTel shall provide number portability to Socket Telecom, LLC under the circumstances described in this Report and Order, both as to the specific requests listed in Socket Telecom, LLC's complaint and in general.

4. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC d/b/a CenturyTel shall not reject a porting request from Socket Telecom, LLC based on network capacity concerns.

5. All other requests for relief not specifically granted are denied.

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[79] Ex. 1, p. 22, 45; Tr. 90, 264.

[80] *See, e.g., In re Southwestern Bell*, 18 S.W.3d 575, 577 (Mo. App. 2000); *C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322, 325 (Mo. banc 2000).

6. This order shall become effective on April 5, 2008.
7. This case shall be closed on April 6, 2008.

Davis, Chm., Clayton, and Appling,
CC., concur;
Murray and Jarrett, CC., concur, with
separate concurring opinion attached;
and certify compliance with the
provisions of Section 536.080, RSMo.

CONCURRING OPINION OF COMMISSIONERS CONNIE MURRAY AND TERRY JARRETT

We reluctantly concur with the Commission's ultimate decision in its Report and Order. We agree with the majority's outcome in regard to Issue 1, that federal law does not require CenturyTel to port the telephone numbers in question, Issue 3, that network capacity issues are not grounds to deny a port order in this instance and Issue 4, that the question is moot regarding whether Socket is required to have a block of numbers assigned to it for a rate center before CenturyTel has to fulfill number port orders from Socket for that rate center. In regard to Issue 2, that CenturyTel must port the telephone numbers in question based on the parties' interconnection agreement, we must agree with the majority despite the unjust outcome. In summary, we believe that the Commission's decision is correct based upon a flawed Interconnection Agreement that was forced upon the parties by the Commission's Arbitration decision in Case No. TO-2006-0299, and existing "industry guidelines" and "industry agreed-upon practices."

ISSUE 2

We believe there are two distinct questions that must be answered, the second of which the Report and Order fails to address. First, should the numbers be ported pursuant to the Interconnection Agreement? Second, whether after a CenturyTel number has been ported to Socket, Socket should be allowed to sell the use of Virtual NXX ("VNXX") service over CenturyTel's infrastructure before the point of interconnection ("POI") for Internet Service Provider ("ISP') bound traffic?

The commission found that CenturyTel must port the numbers in question pursuant to Article XII, Section 3.2.1 and Section 6.4.4 of the Interconnection Agreement which requires such a port according to

"industry agreed-upon practices" and "industry guidelines". The evidence admitted at hearing and supplemented by the admission of the Local Number Portability Working Group's minutes and the Number Porting Best Practices document, that was revised based upon the issues presented in this case, proves that "industry agreed-upon practices" or at the very least "industry guidelines" have been established. Therefore, we agree with the majority that the numbers should be ported based upon industry guidelines in existence today. However, should industry guidelines as expressed by the Local Number Portability Working Group's Number Porting Best Practices document be revised in the future in such a way that Socket no longer meets the caveats, we expect the parties to voluntarily implement any such change in future porting requests. Further, it is important to note that the Local Number Portability Working Group's consideration of this matter does not necessarily contemplate the ported numbers being used to carry ISP-bound traffic.

The commission should have also addressed the unjust outcome of its decision to require the numbers in question to be ported. As a result of the Report and Order, Socket will be allowed to send an unlimited amount of ISP-bound traffic over CenturyTel's infrastructure, in the form of VNXX traffic, at no cost to Socket. This abuse is allowed by Article V, Section 9.2.3 of the Interconnection Agreement which was drafted as a result of the Commission's Arbitration Order, and states that VNXX traffic "shall not be deemed Local Traffic but shall be Bill-and-Keep." Unfortunately, this section does not differentiate between ISP-bound traffic and non-data traffic. During the arbitration, CenturyTel agreed to the language currently contained in the Interconnection Agreement's provision addressing VNXX traffic if the following qualifier was included.

> [P]rovided that Socket agreed to maintain the terms of the recent addendum agreement between CenturyTel and Socket whereby Socket agreed to place a POI at every CenturyTel end office and [*sic*] where all ISP-bound traffic is at bill and keep. Should Socket not agree to abide by its recent addendum terms, CenturyTel reserves the right to revert to its

> advocacy position on this issue which is that access charges do apply to all ISP-bound traffic that terminates to a physical ISP location outside the local calling area.

Had this qualifier been included in the Interconnection Agreement, the current case would likely have never been brought because Socket would have a POI at every rate center from which Socket ISP-bound traffic originates. Regrettably, the qualifier was struck and as a result, the Interconnection Agreement requires VNXX traffic to be “Bill-and-Keep” regardless of whether it is ISP-bound or of how far CenturyTel has to carry the traffic to the POI. This case brings to light the unfair effect of the Commission’s decision to strike CenturyTel’s proposed language from the Interconnection Agreement. In hindsight, we believe the commission erred in allowing this language to be stricken from the Interconnection Agreement. [81] Unfortunately, based on the terms of the Interconnection Agreement, the commission now has no choice but to allow Socket to freeload a massive amount of ISP traffic on CenturyTel’s network for several months until such time that a POI is required by the Interconnection Agreement to be established in the rate center due to the increased traffic.

For the foregoing reasons, we concur in the Report and Order.

[81] Commissioner Murray concurred in the Arbitration Order.

In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area*

Case No. ER-2006-0315
Issue Date: March 26, 2008

Electric §1. The Commission made amendments with regard to the Capital Structure and other sections of its Report and Order due to incorrect usage of the true-up data.

ORDER GRANTING RECONSIDERATION OF REPORT AND ORDER

The Commission having reviewed all the pending applications for rehearing and reconsideration determines that certain aspects of its Report & Order issued December 21, 2006, should be reconsidered. Specifically, the Commission makes amendments with regard to the Capital Structure and other sections of its Report and Order because the Commission failed to use the true-up data, even though that is what the Commission clearly said it was intending to use. In addition, the Commission includes one issue that was originally overlooked and later added in the January 15, 2007 order of clarification, and the Commission includes the tariff issues which arose as a result of the Commission's December 14, 2007 order. The Commission also sets out the tariff sheets referred to in the December 14, 2007 order. Furthermore, the Commission added certain findings of fact. Finally, the Commission determines that because of the additions and corrections, some of the pending applications for rehearing are moot. Therefore, the Commission issues the attached Report and Order Upon Reconsideration.

IT IS ORDERED THAT:

1. The attached Report and Order Upon Reconsideration is adopted.
2. This order shall become effective on April 5, 2008.

Davis, Chm., Murray, Appling,
and Jarrett, CC., concur.
Clayton, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge

***Note:** Another order in this case can be found at page 222.

*The case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 328 SW 3d 329, (Mo App. W.D. 2010).

In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area.*

Case No. ER-2006-0315
Decided March 26, 2008

Electric §13. The Commission concluded that it should allow Empire to use the gain from unwinding a forward natural gas contract to directly offset the under-recovery of fuel and purchased power costs.

Electric §13. The Commission decided to use Empire's actual consolidated capital structure as of June 30, 2006, the end of the true-up period ordered, the Staff's methodology for calculation of the regulatory plan amortizations, and Empire's prices and methodologies for predicting its annual fuel costs because it is reasonable and most likely to be accurate.

Electric §20. The Commission concluded that it must determine just and reasonable rates based on what it deemed to be Empire's prudently incurred costs.

Electric §20. The Commission concluded that incentive compensation for meeting earnings goals, charitable activities, activities unrelated to the provision of retail electric service, discretionary awards, and stock options should not be recoverable in rates.

Electric §23. The Commission concluded that 10.9% is the reasonable and appropriate ROE for Empire.

Rates §20. The Commission concluded that it must determine just and reasonable rates based on what it deemed to be Empire's prudently incurred costs.

APPEARANCES

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*The Report and Order in this case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 328 S.W. 3d 329 (Mo App. W.D. 2010).

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REGULATORY LAW JUDGE ON RECONSIDERATION: Nancy Dippell, Deputy Chief.

REGULATORY LAW JUDGE: Colleen M. Dale, Chief.

REPORT AND ORDER UPON RECONSIDERATION

I. BACKGROUND

A. Procedural History

On February 1, 2006, The Empire District Electric Company ("Empire") filed proposed tariff sheets, Tariff File No. YE-2006-0597, designed to implement a general rate increase for retail electric service. The matter was opened and denominated ER-2006-0315. The new rates contained therein were designed to produce an additional $29,513,713 in gross annual electric revenues, excluding gross receipts, sales, franchise, and occupational taxes, a 9.63% increase over existing revenues. The tariff sheets proposed an effective date of March 3, 2006.

The Commission issued its Suspension Order and Notice on February 7, 2006, suspending the proposed tariff sheets for 180 days plus six months from the original proposed effective date, that is, until January 1, 2007. In that order, the Commission also set an evidentiary hearing and a deadline for intervention applications. Intervention was granted to Praxair, Inc. and Explorer Pipeline Company ("the Industrials"), Aquila, Inc., Kansas City Power & Light, and the Missouri Department of Natural Resources ("DNR").

On April 11, the Commission adopted a procedural schedule that included dates for the filing of prepared testimony and a briefing schedule. On June 26 and June 27, pursuant to notice provided by the Company through billing inserts, the Commission convened local public hearings within Empire's service territory, at Joplin and Reeds Spring, respectively.

Pursuant to the procedural schedule, the Commission convened an evidentiary hearing on September 7 at its offices in Jefferson City, Missouri. Proceedings continued during that week and during the week of September 15. The true-up portion of the hearing was held on November 20. The Commission heard the testimony of 44 witnesses; 153 exhibits were offered during the hearing, including the pre-filed testimony of the witnesses. Most of those exhibits were admitted, some over objection preserved for appeal, some of which were admitted after a portion was stricken. Some of the exhibits were not admitted, although of some, administrative notice was taken.

Many issues were resolved by the agreement of the parties. On August 18, a Stipulation and Agreement as to Certain Issues was filed and served on the parties. No party objected and the stipulation was approved by the Commission on August 31. On September 13, a Nonunanimous Stipulation and Agreement Regarding Rate Design Issues was filed. No party objected and the stipulation became unanimous by operation of Commission rule on September 20. Two further stipulations were filed, one concerning corporate allocations and one on regulatory plan amortizations. As timely objections were raised to those two stipulations, by Commission rule the stipulations are reduced to nonbinding position statements and all issues contained therein remain for determination on the merits.

On November 20, at the conclusion of the hearing, with no further briefing or pleadings due, the parties were informed that although no further filings were required, they were welcome to file any supplemental pleading they believed was appropriate. The Industrials

availed itself of the opportunity and filed a True-Up Brief on November 27.

On December 21, 2006, the Commission issued a Report and Order in this matter, to be effective December 31, 2006. Empire, the Office of the Public Counsel ("OPC"), and the Industrials each filed an Application for Rehearing with regard to the Report and Order.

On December 28, 2006, Empire filed revised tariffs sheets with a proposed effective date of January 27, 2007, and a motion for expedited treatment requesting approval of the revised tariff sheets to be effective January 1, 2007. Empire stated that the tariff sheets were filed in compliance with the Commission's December 21, 2006 Report and Order. On December 28, 2006, OPC and the Industrials objected to the tariff filing. On December 29, 2006, the Staff of the Commission filed its Staff Recommendation regarding the tariff filing, in which Staff explained that it had reviewed the filed tariff sheets. Staff stated that the tariff sheets were in compliance with the Report and Order, and Staff recommended expedited approval of the tariff sheets, as described in the cover pleading of the Staff Recommendation.

The Commission found those tariff sheets to be an accurate reflection of the revenue increase authorized by the Report and Order, and on December 29, 2006, the Commission issued its Order Granting Expedited Treatment and Approving Tariffs, to be effective January 1, 2007. On January 1, 2007, the Industrials filed an Application for Rehearing with regard to that order.

On January 4, 2007, OPC filed a Petition for Writ of Mandamus with the Missouri Court of Appeals, Western District, seeking to have the Order Granting Expedited Treatment and Approving Tariffs issued by the Commission on December 29, 2006, set aside. On March 12, 2007, the Court of Appeals issued an order denying OPC's petition.

On January 9, 2007, the Commission issued its Order Supplementing and Clarifying Report and Order, to be effective January 19, 2007. Empire, OPC, and the Industrials each filed an Application for Rehearing with regard to the Order Supplementing and Clarifying Report and Order. Thereafter, on January 27, 2007, the Commission issued its Order Setting Conference.

Before this conference could take place, the Industrials filed a Petition for Writ of Review with the Cole County Circuit Court on January 31, 2007. The Circuit Court issued a Writ, but the Commission moved to have the Writ set aside and the case dismissed. Consistent with filings

made by the Commission and the Industrials, the case was dismissed by the Circuit Court on November 21, 2007.

On March 19, 2007, OPC filed a Petition for Writ of Mandamus with the Missouri Supreme Court seeking an order requiring the Commission to vacate and rescind its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and directing the Commission to provide an effective date for any subsequent tariff approval order that allows at least ten days to prepare and file an application for rehearing. On May 1, 2007, the Missouri Supreme Court issued a preliminary writ directing the Commission to respond to OPC's petition. Following briefs and oral argument, on October 30, 2007, the Supreme Court made its preliminary writ peremptory and issued an opinion directing the Commission to vacate its December 29 order and allow the Public Counsel a reasonable time to prepare and file an application for rehearing. The Supreme Court did not examine the lawfulness or reasonableness of the substance of the Commission's December 29, 2006 order, and considered only the timing of the issuance of said order.

On December 4, 2007, the Commission issued an Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs, to be effective December 14, 2007. Also on December 4, 2007, the Commission issued a Notice of Correction with regard to the Tariff File Number referenced in the December 4th Order Approving Tariffs. On December 13, 2007, OPC and the Industrials filed Applications for Rehearing regarding the Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs. On January 15, 2008, the Commission issued an Order of Clarification regarding the tariff sheets approved by the December 4th Order Approving Tariffs.

The Commission, having reconsidered its Report and Order issued December 21, 2006 and Order Supplementing and Clarifying Report and Order issued January 9, 2007, and, upon due consideration of all issues, review of the record and pleadings herein, and without the admission of additional evidence, issues this Report and Order Upon Reconsideration.

With its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, the Commission found and concluded that the revised tariffs sheets filed by Empire on December 28, 2006, with a proposed effective date of January 27, 2007, were just and reasonable and were in compliance with the Commission's December

21, 2006 Report and Order. With its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs, the Commission found and concluded that said tariff sheets are consistent with the Commission's Report and Order and the January 9, 2007 Order Supplementing and Clarifying Report and Order. This remains the Commission's finding and conclusion. The Commission, having reached the same substantive conclusions herein as in its December 21, 2006 Report and Order, finds and concludes that Empire need not file additional or different tariff sheets to comply with this Report and Order Upon Reconsideration.

The issuance of this Report and Order Upon Reconsideration also does not replace tariff sheets which have gone into effect since the issuance of the original Report and Order.[1]

B. Previous Agreement Concerning Fuel and Purchased Power Expense

On April 30, 2004, The Empire District Electric Company ("Empire") filed proposed tariff sheets, Tariff File No. YE-2004-1324, designed to implement a general rate increase for retail electric service. The matter was opened and denominated ER-2004-0570. The proposed rates were designed to produce an additional $38,282,294 in gross annual electric revenues. In partial settlement of that matter, on February 22, 2005, a Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense ("2005 Stipulation") was filed and served on the parties. No party objected and the stipulation became unanimous by operation of Commission rule on March 1.[2] As such, it was subsequently approved by the Commission in its Report and Order issued on March 10, 2005.

The 2005 Stipulation purported to resolve the fuel and purchased power expense at issue in ER-2004-0570 by agreement to a certain level of recovery of those expenses in Empire's permanent rates, not subject to refund, and recovery of an additional amount on an interim basis, subject to true-up and refund, referred to as the Interim Energy Charge ("IEC"). The IEC was to be in effect for a maximum period of three years, unless earlier terminated by the Commission. The 2005 Stipulation provided:

> The IEC tariff or rate schedule will expire no later than 12:01 a.m. on the date that is three years after the

[1] See list of tariff sheets, *supra*, at pages 67 and 68.

[2] The Commission's Staff did file Comments in response to the Nonunanimous Stipulation, but expressly stated that these were not objections.

> original effective date of the revised tariff sheets authorized by the Commission in this case, Case No. ER-2004-0570, unless earlier terminated by the Commission. (page 4)
>
> and
>
> In consideration of the implementation of the IEC in this case and the agreement of the Parties to waive their respective rights to judicial review or to otherwise challenge a Commission order in this case authorizing and approving the subject IEC, for the duration of the IEC approved in this case Empire agrees to forego any right it may have to request the use of, or to use, any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of a fuel adjustment clause, a natural gas cost recovery mechanism, or other energy related adjustment mechanism to which the Company would otherwise be entitled. (page 12)

One of the many issues in the present matter is whether the language in the 2005 Stipulation precludes Empire from seeking a different fuel adjustment clause, precludes Empire from seeking to terminate the IEC and recover all of its fuel and purchased power expenses through its permanent rates, or precludes the Commission from terminating the IEC *sua sponte* and including all of the fuel and purchased power expenses in Empire's permanent rates.

On March 24, 2006 in the present matter, Empire requested clarification of the 2005 Stipulation. In its initial filing creating the present case, Empire sought to terminate the IEC and implement an energy cost recovery rider ("ECR"). Certain other parties asserted that such a request contravened the 2005 Stipulation. Empire asserted that the 2005 Stipulation anticipated the use of the IEC for up to three years, but that it could be terminated at any time during that period by the Commission, contemplating the possibility that the IEC could be terminated early, allowing Empire to avail itself of the newly-created ECR.

After review of the matter, the Commission issued an Order on May 2, 2006 that determined that Empire's position was not supported by the language in the 2005 Stipulation and that Empire is precluded from requesting the use of another fuel adjustment mechanism during the period in which the IEC is in effect, but may have the option of requesting

that the IEC be terminated. The Commission required that Empire remove from its pleadings and other filings in this matter any request, or testimony in support of a request, for an ECR. Empire did not seek rehearing of that Order, but did not remove the precluded language. On May 26, 2006, the Industrials filed a Motion to Reject Specified Tariff Sheets and Strike Testimony seeking to strike not only the precluded language, but also language pertaining to termination of the IEC and inclusion of the associated expenses in permanent rates. On June 1, 2006, Empire conceded that it would strike the precluded language but not the additional language the Industrials sought to have stricken. The Commission, by Order issued June 15, 2006, rejected tariffs and struck testimony pertaining to the ECR, but not that pertaining to termination of the IEC and inclusion of the associated expenses in permanent rates.

II. DISCUSSION

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.[3]

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[3] In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Section 386.420.2, RSMo 2000. Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420. *St ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n. of Missouri.,* 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n.,* 24 S.W.3d 243, 245 (Mo. App., W.D. 2000). Section 536.090 provides, in pertinent part:

> Every decision and order in a contested case shall be in writing and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact. *Glasnapp v. State Banking Bd.,* 545 S.W.2d 382, 387 (Mo. App 1976). Nonetheless, the following formulation is often cited:

A. Jurisdiction

The record shows that Empire operates generation plants for the purpose of generating electricity for sale at retail. The Commission concludes that Empire is thus an electrical corporation within the intendments of Section 386.020(15) and a public utility pursuant to Section 386.020(42), RSMo Supp. 2004.[4] The Commission thus has jurisdiction over Empire's services, activities, and rates pursuant to Sections 386.020(42), 386.250 and Chapter 393.

B. Burden of Proof

Section 393.150.2 provides in part, "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

C. Ratemaking Standards and Practices

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,[5] subject to judicial review of the question of reasonableness.[6] A "just and reasonable" rate

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> The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence. *Id*. *(quoting* 2 Am.Jur.2d *Administrative Law* § 455, at 268).

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected." *St. ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n.,* 680, 684 (Mo. App., W.D. 1991) (quoting *St. ex rel Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n.* 701 S.W.2d 745, 754 (Mo. App., W.D. 1985). Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory." *St. ex rel. Monsanto Co. v. Pub. Serv. Comm'n,* 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949).

[4] Unless otherwise specified, all statutory references are to the Revised Statutes of Missouri (RSMo), revision of 2000.

[5] Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the Commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

[6] *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918); *error*

is one that is fair to both the utility and its customers;[7] it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."[8] In 1925, the Missouri Supreme Court stated.[9]

> The enactment of the Public Service Act marked a new era in the history of pubic utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. *** These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.[10] "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."[11] However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.[12] "There can be no argument but that the Company and its stockholders

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dis'd, 251 U.S. 546, 40 S. Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S. Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

[7] *St. ex rel. Valley Sewage co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo.App., K.C.D. 1974).

[8] *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n,* 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925)

[9] *Id.*

[10] *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41,48 (1937).

[11] *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).

[12] *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

have a constitutional right to a fair and reasonable return upon their investment."[13]

The Commission has exclusive jurisdiction to establish public utility rates,[14] and the rates it sets have the force and effect of law.[15] A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;[16] neither can a public utility change its rates without first seeking authority from the Commission.[17] A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's.[18] Thus, "[r]atemaking is a balancing process."[19]

Ratemaking involves two successive processes:[20] first, the determination of the "revenue requirement," that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.[21] The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year that focuses on four factors:[22] (1) the rate of return the utility has an

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[13] St. ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).
[14] *May Dep't Stores*, *supra*, 107 S.W.2d at 57.
[15] *Utility Consumers Council*, *supra*, 585 S.W.2d at 49.
[16] *Id.*
[17] *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App., W.D. 1999).
[18] *May Dep't Stores*, *supra*, 107 S.W.2d at 50.
[19] *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).
[20] It is worth noting here that Missouri recognizes two distinct ratemaking methods: the "file-and-suspend" method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility's rates are not just and reasonable. *See Utility Consumers Council*, *supra*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied,* 429 U.S. 822, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976).
[21] *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App., W.D. 1993).
[22] In the present case, the test year was established as the twelve months ending December 31, 2003, updated for known and measurable changes through June 30, 2004. *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service to Customers in its Missouri Service Area*, Case No. ER-2004-0570 (*Order Concerning Test Year and True-up, and Adopting Procedural Schedule*, issued June 17, 2004) at 7.

opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.[23] The calculation of revenue requirement from these four factors is expressed in the following formula:

RR = C + (V – D) R

where: RR = Revenue Requirement;

C = Prudent Operating Costs, including Depreciation Expense and Taxes;

V = Gross Value of Utility Plant in Service;

D = Accumulated Depreciation; and

R = Overall Rate of Return or Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.[24] The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.230 authorizes the Commission to value the property of electric utilities operating in Missouri, that is, to determine the rate base.[25] Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

The Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a Rate of Return. For any utility, its fair Rate of Return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The

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[23] *Id., citing* Colton, "Excess Capacity: Who Gets the Charge From the Power Plant?," 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

[24] *See St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, *supra*.

[25] Section 393.135 expressly prohibits the inclusion in electric rates of costs pertaining to property that is not "used and useful."

weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical costs; however, in the case of Common Equity, the cost used is its estimated cost.

Based on the detailed findings set forth below in this Report and Order Upon Reconsideration, the Commission concludes that Empire has a revenue deficiency. Further, as illustrated by the Commission's findings and conclusions on individual issues, all as set out below, the Commission finds and concludes that Empire should be authorized an additional $28,010,433 in traditional revenue requirement (including the IEC), in addition to $10,168,615 for regulatory plan amortizations, for a total of $38,179,048 additional revenue requirement. With regard to the net rate increase to Empire's customers, however, the traditional revenue requirement needs to be reduced by the true-up value of the IEC ($8,809,651).[26] Accordingly, and based on the Commission's findings in this case, the Commission concludes that tariffs designed to increase Empire's total electric revenues by $29,369,397 are just and reasonable. As Empire's tariffs filed with the Commission on December 28, 2006 are designed to produce an increase in Empire's gross annual electric revenues of $29,369,397 ($28,010,433 - $8,809,651 + $10,168,615), Empire is not directed to file additional or different tariff sheets in response to this Report and Order Upon Reconsideration.

D. Overview

1. The Parties

The Empire District Electric Company is a publicly-traded Kansas corporation, headquartered in Joplin, Missouri. Empire provides retail electric service in Missouri, Kansas, Arkansas, and Oklahoma; retail water service in Missouri; and is also certificated to provide telecommunication services in Missouri. In addition, Empire recently acquired Aquila, Inc.'s natural gas distribution operations in Missouri. On April 18, 2006, the Commission issued an order approving that transaction; on June 15 it recognized the adoption of Aquila's relevant tariffs.

Intervenor Praxair, Inc., produces compressed gases at a plant near Neosho, Missouri, within Empire's service territory. Praxair is served under interruptible rates, which means that service to Praxair can

[26] See Oligschlaeger True-Up Testimony, p. 10; Staff Recommendation And Response and accompanying Staff Memorandum filed on December 29, 2006.

be reduced on short notice, making more power available to Empire to serve other customers.

Intervenor Explorer Pipeline, Inc., operates a refined petroleum products pipeline stretching from the coast of the Gulf of Mexico to the Chicago area, with various truck terminals along that route. Explorer uses electric compressors to move its products through the pipeline and has three compressor stations within Empire's service territory.

Intervenor Kansas City Power & Light is a regulated electric and gas utility that operates in Missouri and elsewhere.

Intervenor Aquila, Inc. is a regulated electric and gas utility that operates in Missouri and elsewhere.

The Missouri Department of Natural Resources ("DNR") is an executive branch department authorized and established by Chapter 640, RSMo. Sections 640.150 through 640.185 charge the Department with certain responsibilities with respect to energy.

The Public Counsel ("OPC") is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"[27]

The Staff of the Commission traditionally appears as a party in Commission proceedings and is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]"[28]

2. Empire's Proposed General Rate Increase

As filed, Empire's proposed tariffs sought additional gross annual Missouri jurisdictional revenue of approximately $29.5 million annually, a 9.63% increase.

3. Empire's Operations

Empire provides electric service in an area of about 10,000 square miles in Southwest Missouri and the adjacent areas of Arkansas, Kansas and Oklahoma. As of September 30, 2005, Empire had 135,222 residential electric customers, 23,773 commercial customers, 366 industrial customers, 1,861 public authority customers, and 4 wholesale customers in 121 communities in 20 counties. Most of these communities are small; the largest is Joplin, with about 45,500 inhabitants at the end of 2004.

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[27] Sections 386.700 and 386.710.
[28] Section 386.071.

About 88.8% of Empire's 2005 retail electric revenues are derived from Missouri. In Missouri, as of September 30, 2005, Empire had 118,631 residential customers, 20,968 commercial customers, 294 industrial customers, 1,503 public authority customers, and 3 wholesale customers.

E. The Issues

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules. Those issues as formulated by the parties are fully recited at the beginning of the discussion of each issue, set forth below. [29]

1. Return on Common Equity: What return on common equity should be used for determining Empire's rate of return?

The Commission must estimate the cost of common equity capital. This is a difficult task, as academic commentators have recognized.[30] The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task.[31] In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.[32]

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[29] Only the issues and sub-issues not resolved by the two unanimous stipulations are shown. The numbering of the issues is unchanged from the original list, except that an issue which arose during the true-up period has been added to the list and is addressed herein. The parties' positions on the issues are discussed, to the extent necessary, elsewhere in this order.

[30] Phillips, *The Regulation of Public Utilities*, *supra*, 394; Goodman, 1 *The Process of Ratemaking*, *supra*, 606.

[31] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv., Comm'n of West Virginia*, 262 U.S. 679, 43 S. Ct. 675, 67 L.Ed. 1176 (1923).

[32] *Bluefield*, *supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

In the same case, the Court provided the following guidance as to the return due to equity owners:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[33]

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

> '[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[34]

[33] *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

[34] *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

Two principal methods have emerged for determining the cost of Common Equity: these are the "market-determined" approach and the "comparable earnings" approach.[35] The market-determined approach relies upon stock market transactions and estimates of investor expectations.[36] Examples of market-determined methods are the discounted cash flow ("DCF") and the capital asset pricing model ("CAPM").[37] The comparative earnings approach relies upon the concept of "opportunity cost," that is, the return the investment would have earned in the next best alternative use.[38] The comparative earnings approach requires a comparative study of earnings on common equity in enterprises of similar risk, regardless of whether the enterprises are regulated or unregulated.[39] A method that was used by Empire witness Vander Weide, and which does not fall within the boundaries of either of the principal approaches referred to above, is the Risk Premium method. This method is "relatively straightforward" and requires that the analyst "(1) determine the historic spread between the return on debt and the return on common equity, and (2) add this risk premium to the current debt yield to derive an approximation of current equity return requirements."[40] In the final analysis, it is not the method employed, but the result reached, that is important.[41] The Constitution "does not bind ratemaking bodies to the service of any single formula or combination of formulas."[42]

The annual form of the DCF method of calculating a fair return on common equity can be expressed algebraically by this equation:

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[35] *Phillips*, *supra*, 394.
[36] *Id.*
[37] *Id.*
[38] *Id.*, at 397.
[39] *Id.*, at 397-98.
[40] *Id.*, at 399.
[41] Within a wide range of discretion the Commission may select the methodology. *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434 (Mo. App., W.D. 1998), *rehearing and/or transfer denied*; *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880, 882 (Mo. App., W.D. 1985); *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 888 (Mo. App., W.D. 1981). It may select a combination of methodologies. *State ex rel. City of Lake Lotawana v. Public Service Comm'n of State*, 732 S.W.2d 191, 194 (Mo. App., W.D. 1987).
[42] *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

$k = D_1/P_S + g$

where: k is the cost of equity;
g is the constant annual growth rate of earnings,
dividends and book value per share;
D_1 is the expected next period annual dividend; and
P_S is the current price of the stock.

Assuming that dividends grow at a constant annual rate, g, this equation can be solved for k, the cost of equity. The term D_1/P_S is called the dividend yield component of the annual DCF model, and the term g is called the growth component of the annual DCF model. The annual DCF model is only a correct expression for the present discounted value of future dividends if the dividends are paid annually. The quarterly DCF model differs from the annual DCF model in that it expresses a company's price as the present discounted value of a quarterly stream of dividend payments. The quarterly DCF equation shows that the cost of equity is: the sum of the future expected dividend yield and the growth rate, where the dividend in the dividend yield is the equivalent future value of the four quarterly dividends at the end of the year, and the growth rate is the expected growth in dividends or earnings per share.[43]

The CAPM describes the relationship between a security's investment risk and its market rate of return. This relationship identifies the rate of return that investors expect a security to earn so that its market return is comparable with the market returns earned by other securities that have similar risk. The general form of the CAPM is as follows:

$k = Rf + \beta (Rm - Rf)$

where: k = the expected return on equity for a specific security;
Rf = the risk-free rate;
β = beta; and
Rm – Rf = the market risk premium.[44]

The "Risk Premium Method" is based on the principle that investors expect to earn a return on an equity investment in Empire that

[43] Vander Weide Direct at 20-23.
[44] King Direct at 20.

reflects a "premium" over and above the return they expect to earn on an investment in a portfolio of bonds. This equity risk premium compensates equity investors for the additional risk they bear in making equity investments instead of bond investments. The formula for the *ex ante* risk premium calculation is as follows:

$RP_{PROXY} = DCF_{PROXY} - I_A$

Where: RP_{PROXY} = the required risk premium on an equity investment in the proxy group of companies,

DCF_{PROXY} = average DCF cost of equity on a portfolio of proxy companies, and

I_A = the yield to maturity on an investment in A-rated utility bonds.

Empire is a publicly-traded utility. Empire's consolidated common equity ratio has ranged from a high of 48.02% to a low of 37.26% from 2001 through 2005. During the past five years, Empire's average return on common equity ("ROE") has been fairly low. Although Empire's ROE was above 8% in 2001 and 2002, since then it has been 6% or lower. Empire's corporate credit rating by Standard & Poor's was downgraded, on May 16, 2006, from BBB to BBB-, the lowest investment grade rating, although it does give Empire a "stable" outlook. Further, it removed Empire from a negative credit watch on February 13, 2006.[45]

The industry national average ROE for electric utilities in 1st Quarter 2006 was 10.57%, and 10.55% for the year 2005.[46] Empire's ROE was 6.04% for 2005.[47] Empire's ROE is expected by analysts to be 6.5% for 2006. Since 2001, Empire has paid out virtually all of its earnings as dividends, dipping below 100% only once in the past five years.[48] Empire's 2005 Annual Report, filed with the Commission as required by statute, states that Empire's total operating revenues were $386,160,000 for the 12 months ended December 31, 2005, versus $325,540,000 for the 12 months ended December 31, 2004. These 2005 revenues resulted in an overall net income applicable to common stock of $23,768,000 for an earnings per share of $0.92 as compared to

[45] Murray Direct at 13-14.
[46] Murray Direct at 32.
[47] Murray Direct at 14-15.
[48] Murray Direct at 15.

the 2004 net income applicable to common stock of $21,848,000 for an earnings per share of $0.86. These revenues and net incomes were generated from total property, plant and equipment of $896,033,000 at December 31, 2005 and $857,035,000 at December 31, 2004. [49]

James Vander Weide is a Research Professor at Duke University who testifies in this matter on behalf of Empire. Charles King is an economic consultant who testifies in this matter on behalf of OPC. David Murray is a Utility Regulatory Auditor III who testifies in this matter as a member of the Staff. All three are experienced in testifying and are experts in the area of regulatory economics.

Vander Weide estimated Empire's cost of equity in two steps. First, he applied the quarterly DCF method yielding a result of10.9%; the risk premium method (both the *ex ante* and *ex post* methods) which yielded results of 11 % and 11.4% respectively;[50] and the CAPM yielding a result of12.2% to a proxy group of comparable companies, including 34 electric utilities and 13 gas utilities, for a total of 47 companies, and determined that the average cost of equity for his proxy companies was 11.3%.[51] Second, he adjusted the average cost of equity for the proxy group for the difference in the financial risk implied by the capital structure of Empire[52] by adding 40 basis points to the result to reach his recommendation of 11.7%.[53]

King used the DCF method, applying it to two groups of comparison companies. The first group consisted of 16 electric companies that derive over 75% of their revenue from regulated utility service, noting that Empire generated 93.2% of its 2005 revenue from such services.[54] The second group consisted of those plus 10 additional companies that derive a significant portion of their revenue from unregulated activities. As a check, King calculated Empire's cost of common equity using the CAPM analysis, producing a 9.85% ROE.[55] Using the classic DCF method, King's analyses produced results of 9.65% for the first group, 10.09% for the second group and 10.57% for Empire itself.[56] Based on his conviction that the DCF for the first group, whose derivation of revenue is most closely aligned with Empire's, was

[49] Murray Direct at 13.
[50] Vander Weide Rebuttal at 43.
[51] Vander Weide Direct at 49.
[52] Vander Weide Direct at 50.
[53] Vander Weide Direct at 51.
[54] King Direct at 6.
[55] King Direct at 23.
[56] King Direct at 15.

the more appropriate conclusion, King gives 9.65% as his final recommendation.[57]

Murray primarily relied on a comparable-companies method to determine the cost of common equity for Empire. He first relied on the Standard & Poor's list of vertically-integrated electric utilities, of which there are eleven, including Empire. He then applied additional criteria to narrow the group to six, including Empire. He then treated the five remaining comparables as a group. Using the DCF method, and after compensating for growth volatility, Murray arrived at a range of 9.0% - 9.3% for the proxy group of comparable companies. Murray also used the CAPM analysis to check the reasonableness of his DCF results. Using three different variables in the risk premium value in the CAPM formula, the resulting ROEs for the proxy group were 6.24%, 8.98% and 10.26%. Using forward-looking risk premium inputs yielded 7.39% - 8.79% ROEs for the proxy group. Finally, Murray selected a group of four comparable companies and applied the DCF method and the CAPM to them to further test the reasonableness of his company-specific DCF result. Using the comparable company analysis, giving "considerable deference" to the projected earnings per share growth rates and adding ten basis points for every notch of credit rating differential from the comparable company average of BBB+, Murray recommended an ROE for Empire of 9.2% - 9.5%. In his rebuttal testimony, Murray revised the growth rate and dividend yield, resulting in a revised recommendation of 9.5% - 9.6%.[58]

Determining ROE "is an area of ratemaking in which agencies welcome expert testimony and yet must often make difficult choices between conflicting testimony.[59] The experts did not agree in their recommendations or in the methods used to reach those recommendations, although they used the same formulae and performed similar analyses. Vander Weide and King both began with DCF approaches, and both then used a CAPM analysis. King used it as a check on his DCF analysis, Vander Weide as a second computational method from which to derive an average; he then went on to apply two risk premium analyses. Murray started with a comparable companies approach, then applied the DCF and CAPM analyses to his group of companies. Their methods were similar; the difference in results is

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[57] King Direct at 27-28.
[58] Murray Rebuttal at 3.
[59] Goodman, 1 *The Process of Ratemaking*, *supra*, 606.

derived mainly from the comparable companies that formed the "proxy group." Vander Weide's consisted of 47 regulated energy utilities; King's consisted of 16 regulated electric utilities that derive over 75% of their revenue from retail electric service; Murray's consisted of 5 comparable, vertically-integrated, regulated energy utilities.

Each of the expert witnesses used a comparative analytical strategy in which Empire's cost of common equity was determined by examining a proxy group of regulated utilities selected on the basis of comparable investment risk. They each selected a sample that they believed had "comparable risk." They all went on to use other analytical tools to check the reasonableness of their results. In addition, Vander Weide performed an additional risk assessment and added 40 basis points to his calculated return.

All of the three analysts performed the sort of risk-based, comparative analysis required by *Hope* and *Bluefield*. All three analysts yielded results that, at least initially, fall within the "zone of reasonableness" defined by this Commission in a previous case (within 100 basis points above or below the industry average).[60] The national average ROE was 10.57% in the first quarter of 2006 and 10.55% for calendar year 2006; Vander Weide was at 11.3% (prior to adding the 40 basis points); King was at 9.65% and Murray was at 9.5-9.6%.

Finding: The Commission finds that none of the experts' final results appear to be reasonable. Although Empire's financial position seems more precarious than average, it is not more so than in the last rate case. On the other hand, the risk associated with investment in Empire does not appear to have abated significantly since then.[61] In that case, Empire was granted an ROE of 11%. An ROE of 11.7% is well beyond an appropriate compensation for any perceived additional risk; an ROE of 9.5% assumes that investment in Empire involves very little risk.

Empire's DCF and *ex ante* risk premium calculations yielded the results of 10.9% and 11.0%, respectively, using the largest group of comparable companies. Although the Commission is unwilling to set a minimum number of companies in a proxy group, it understands that the smaller the sample size, the greater the chance, statistically, for error. A

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[60] *In the Matter of Missouri Gas Energy*, Case No. GR-2004-0209 (*Report and Order*, issued Sept. 21, 2004) 20.

[61] The evidence is unrefuted that Empire's credit rating is the lowest investment-grade rating. It has not been able to realize the return on equity of 11.0% authorized in its last rate case.

sample group of five companies is simply too small to perform a credible analysis in this scenario. The OPC used two samples, the larger of which yielded a higher ROE. We view as less credible the reduction of the sample size to yield the low ROE the OPC recommended. When a sufficiently large group is used as the proxy, the results fall between 10% and 11%, which makes sense since the national average is also between 10 and 11 %.[62]

Conclusion: The Commission must draw primary guidance in the evaluation of the expert testimony from the Supreme Court's *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for Empire's shareholders must be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved. The language of *Hope* and *Bluefield* unmistakably requires a *comparative method*, based on a quantification of risk.

Investor expectations of Empire are not the sole determiners of ROE under *Hope* and *Bluefield*; we must then compare it to the performance of other companies that are similar to Empire in terms of risk. *Hope* and *Bluefield* also expressly refer to objective measures. The allowed return must be sufficient to ensure confidence in the financial integrity of the company in order to maintain its credit and attract necessary capital. By referring to confidence, the Court again emphasized risk.

In its decision in *Missouri Gas Energy*, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average.[63] However, the national average is an indicator of the capital market in which Empire will have to compete for necessary capital. One requirement imposed by *Hope* and *Bluefield* is that Empire's rates be sufficient to permit it to obtain necessary capital.

In light of the comparable companies' average ROE at or near 10.9%, the national average ROE, and the perceived risks associated with investment in Empire (including the downgrade of Empire's credit rating to the lowest investment grade after this case was filed), the

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[62] Transcript, p. 354; p.1232; Ex. 98.

[63] *In the Matter of Missouri Gas Energy*, Case No. GR-2004-0209 (*Report and Order*, issued Sept. 21, 2004) 20.

Commission concluded that 10.9% is the reasonable and appropriate ROE for Empire.

2. Capital Structure: What capital structure should be used for determining Empire's rate of return? Should the unamortized expenses and discounts be reduced from the total principal amount of long-term debt and trust preferred stock outstanding for determining Empire's capital structure for ratemaking purposes?

Empire's actual consolidated capital structure as of June 30, 2006, was composed of 43.81% long-term debt, at an embedded cost of 7.02%; 5.39% trust preferred securities, at an embedded cost of 8.90% and 50.80% common equity. All three of the parties who provided witnesses on this topic agreed that this is the capital structure to be used in the calculation of the rate of return, including agreement on the embedded cost of long-term debt.[64] Based on the ROE determination discussed above, the Staff recommends a rate of return of 8.41% - 9.55%.[65] Empire seeks an overall rate of return of 9.55%.[66]

The composition of the capital structure and the embedded cost of the components other than common equity is not difficult to ascertain. It is simply a "snapshot" as of a given moment in time. The parties that filed testimony and took a position on this issue agreed to use of Empire's actual consolidated capital structure.

Having determined Empire's Cost of Common Equity, the Commission may calculate Empire's composite weighted cost of capital, that is, its fair rate of return:

Component	Proportion	Cost	Weighted Cost
Long-term Debt	43.81%	7.02%	3.09%
Preferred securities	5.39%	8.90%	0.48%
Common equity	50.80%	10.9%	5.54%
	100.00%		9.10%

Finding: Empire's actual consolidated capital structure as of June 30, 2006 was composed of 43.81% long-term debt, at an

[64] Murray Rebuttal at 3-4.
[65] Oligschlaeger True-up Testimony, Ex. 148, p. 3, lns. 10-12.
[66] Keith Direct at 11.

embedded cost of 7.02%; 5.39% trust preferred securities, at an embedded cost of 8.90%; and 50.80% common equity.[67]

Conclusion: The Commission will use Empire's actual consolidated capital structure as of June 30, 2006, the end of the true-up period ordered in this case. The use of updated figures is generally preferable, as they more nearly reflect the Company as it will exist on the day that the new rates will take effect.

3. Off-system Sales: What amount should be included in Empire's revenue requirement for off-system sales:

The Staff recommends that the amount to be included in the off-system sales is that which actually occurred in the 12-month period ending March 31, 2006, as most representative of the level of off-system sales on an ongoing basis.[68] Although in the previous case, which was less than five years ago, the Staff opined that a five-year average was more reasonable, that previous position was an aberration; in all the preceding Empire cases over the last ten years (encompassing four rate cases) the Staff recommended that the amount not be averaged.[69] Though the Staff notes that it more often uses the trued-up test year to determine the level of off-system sales, it does sometimes use an average, usually over five years, when it feels such an average is appropriate to reach more "normalized" results.[70]

Staff Witness Fischer explains that, in this instance, the result of averaging the off-system sales over five years resulted in an amount that appeared to be skewed too high when the "AEP transactions" were included, and too low when they were excluded.[71] Empire Witness Keith asserts that a five-year average is more appropriate in a rate case than using the true-up test year alone, because any aberrational peaks and

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[67] The Commission has noted that the parties agreed to use Empire's actual consolidated capital structure, but the Commission's Order Concerning Test Year and True-Up and Adopting Procedural Schedule (April 11, 2006) identified capital structure as an item to be trued-up as of June 30, 2006. The capital structure used in the original Report and Order is as of March 31, 2006, while the capital structure as of June 30, 2006, is found in the testimony of Staff witness Mark Oligschlaeger (Exh. 148, p. 3). The result of using the June 30, 2006 capital structure does not change Empire's overall revenue requirement, after consideration of the regulatory amortization, and does not cause higher rates. However, using the June 30, 2006, capital structure reduces the amount of regulatory amortization included in the revenue requirement by approximately $300,000.

[68] Fischer Surrebuttal at 3.

[69] Fischer Surrebuttal at 4.

[70] Fischer Surrebuttal at 4.

[71] Fischer Surrebuttal at 7.

valleys are smoothed out in the averaging process. However, even with averaging, Empire believes it would be appropriate to remove the AEP transactions from the group of off-system sales to be averaged. Moreover, Mr. Keith asserts that the AEP transactions are not an off-system sale at all, and should be excluded on that basis as well.[72] OPC, the only other party to submit testimony on this issue, uses a five-year average without any insertions or removals of any off-system sales transactions. Although OPC Witness Smith conceded that the AEP transactions are not technically off-system sales as the term is generally used, they are a type of transaction appropriately included. He notes that,

> while the individual transaction might have been unusual, the average annual level of off-system sales margin when this transaction is included in computing the average is very close to the actual test year amount and to Empire's test year budget amount for off-system sales margin.[73]

Although the Commission is not bound by its previous decisions,[74] in light of the fact that in the last case, decided just under two years ago, the Commission authorized use of a five-year average, it is unnecessarily complicated to change back and forth, especially when there is little actual difference between the five-year average and the 12-month amount.

Finding: The Commission agrees with OPC that using an average smoothes out the peaks and valleys, and that to exclude a transaction because it was unusual defeats the purpose of calculating the average.

Conclusion: The Commission concludes that the AEP transaction was properly included in the calculation of off-system sales. Although not an off-system sale *per se*, we agree with OPC that it is the type of transaction properly included in the category of off-system sales. The Commission concludes that the continued use of an unadjusted five-year average for the calculation of off-system sales is the most reasonable alternative.

4. Regulatory Plan Amortizations. Should Empire's revenue requirement include regulatory plan amortizations? If so, (i) how

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[72] Keith Rebuttal at 10-13.
[73] Smith Surrebuttal at 3.
[74] See the discussion under "f." below.

should Empire's off-balance sheet obligations be valued for purposes of the amortizations and (ii) should the amortized amount be subject to an income tax gross-up?

On October 24, 2006, the Commission issued an Order Setting Hearing for October 31, 2006 for the purpose of allowing the parties to cross-examine witnesses on the corporate allocations, additional amortizations and true-up testimony. The Commission stated that following cross-examination, parties would have the opportunity to make closing arguments on these three topics in lieu of submitting briefs. The Staff and OPC took the opportunity to address in their true-up testimonies filed on September 27, 2006 the nonunanimous stipulation and agreement on regulatory plan amortizations that they anticipated would be subsequently filed and was filed on October 27, 2006.[75] On October 31, 2006, a hearing was convened but was objected to as having been set with less than ten (10) days notice. The hearing was reset for November 20, 2006. On November 1, 2006, Praxair was granted subpoenas to compel the attendance of two Empire witnesses. Empire filed an objection and Motion to Quash Subpoenas or, in the Alternative, Motion to Continue Hearing. On November 16, 2006, the Commission issued an Order Quashing Subpoenas. An evidentiary hearing was held on November 20, 2006.

At the November 20, 2006 evidentiary hearing, witnesses for Empire, the Staff, OPC and the Industrials were available for cross-examination. Respecting the Empire witness, Mr. W. Scott Keith, the Regulatory Law Judge sustained an objection by Counsel for Empire to the scope of the cross-examination on regulatory plan amortizations by the Counsel for Praxair. The Counsel for Praxair made an offer of proof.[76] The true-up testimony of Mr. Keith, Exhibit No. 144, which was received into evidence, stated that said testimony was not addressing the appropriate method to calculate the amortization.[77]

The true-up testimony of Staff witness Mr. Mark L. Oligschlaeger, Exhibit No. 148, was received into evidence without objection at the November 20, 2006 evidentiary hearing.[78] The true-up testimony of OPC witness Russell W. Trippensee, Exhibit No. 152, was received into evidence without objection and without the necessity of his taking the

[75] Tr. 1281-1282, 1343, Vol. 20.
[76] Tr. 1274, Vol. 20.
[77] Keith True-Up at 10; Tr. 1271, 1215.
[78] Tr. 1273, Vol. 20.

stand at the November 20, 2006 evidentiary hearing.[79] Mr. Oligschlaeger testified on November 20, 2006, that his true-up testimony, pages 11-15, addressed the Nonunanimous Stipulation And Agreement Regarding Regulatory Plan Amortizations, and is supportive of that nonunanimous stipulation and agreement. The true-up testimony of OPC witness Mr. Trippensee is also supportive of the nonunanimous stipulation and agreement on regulatory plan amortizations.[80]

The Staff, in true-up testimony, updated its calculations for the Regulatory Plan amortizations authorized in the Stipulation and Agreement for Case No. EO-2005-0263 to reflect the Staff's updated true-up revenue requirement. The Staff proposed changes to the methodology used to calculate the Regulatory Plan amortizations in the area of capital structure allocation and in the amount of additional book depreciation required to meet the rating agency metrics.

In the amortization calculations it sponsored in supplemental direct testimony, the Staff derived the long-term debt component used in the ratio analysis by taking Empire's total company capital structure, determining the portion of that capital structure supported by long-term debt, and then applying a Missouri jurisdictional plant allocation factor to that long-term debt amount. At that time, that approach was believed to provide an accurate quantification of Empire's long-term debt associated with its electric operations. Since then, Empire has acquired significant natural gas operations. To ensure that the debt associated with new gas and existing non-regulated operations was not included in the amortization intended only for Missouri jurisdictional electric operations, the Staff revised its approach so the amount of debt attributable to Empire's electric business is more appropriate. Under the new approach, the Staff analyzed Empire's Electric Balance Sheet as of June 30, 2006, and determined the amount of Empire's net investment in its electric operations not reflected in its rate base (such as construction work in progress and net regulatory assets). The Staff then combined this amount with its recommended electric rate base and applied the current percentage of long-term debt in Empire's capital structure to the combined rate base/balance sheet net investment amount to determine the amount of long-term debt attributable to Empire's electric operations used in the Regulatory Plan calculation.

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[79] Tr. 1301, Vol. 20.
[80] Tr. 1279, 1281-1282, Vol. 20.

With regard to the issue of the March 31, 2006 discounted present values of the two involved purchased power contracts, OPC asserts that the off-balance sheet obligations should be discounted back to their individual present values by applying a 10% risk factor (see Robertson Rebuttal at 23-24). This would, according to the OPC, serve to determine the debt-equivalent value of each off-balance-sheet obligation.

The Staff notes that off-balance sheet obligations are considered fixed obligations (i.e., debt) by credit rating agencies for calculating leverage and coverage ratios and are included in credit rating agencies' analyses of debt levels. Standard and Poor's, in its Research Report dated May 18, 2006, established the current value of Empire's off-balance sheet obligations. In the Research Report, S&P noted that it made various adjustments in the determination of that amount. To be conservative, Staff used that amount in its calculations, without further adjustment.[81]

In prior testimony, the Staff recommended that the Commission order that any Regulatory Plan amortizations included in rates be treated as book depreciation by Empire, and that a tax straight-line depreciation deduction equal to the amount of the amortizations be reflected in the ratemaking process. The Staff has made updated calculations to determine the amount of additional book depreciation required by Empire to address the full cash flow requirements of the credit rating agency metrics, as measured in the Regulatory Plan amortization calculation. Consistent with any increase in book depreciation, Empire will recognize a corresponding increase in the tax straight-line depreciation deduction used in calculating deferred income taxes. The impact on deferred tax expense has also been considered in the Regulatory Plan amortization calculations, consistent with the increased book depreciation and increased tax straight-line depreciation deduction resulting from the amortization amounts granted in rates. This impact on deferred tax expense was not considered in the Staff's prior Regulatory Plan amortization calculations. The net result of the Staff's proposed increase in book depreciation recovery through the Regulatory Plan amortization mechanism addresses the agreement to provide Empire the opportunity to obtain the necessary after-tax cash flow required to meet the two Regulatory Plan credit metrics.

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[81] Oligschlaeger Supplemental Direct at pp. 9-10.

The Staff's current Regulatory Plan amortization calculations show, for the IEC Termination scenario, an amount of $20,745,271; and the IEC Continuation scenario, an amount of $43,009,776. This resulted in a change of the Staff's total revenue requirement recommendation under the IEC Termination scenario to $27,865,449, and for the IEC Continuation scenario to $27,750,809. This significant increase mostly related to Empire's greater average debt level for the twelve months ended June 30, 2006, compared to the twelve months ended March 31, 2006. All other things being equal, higher debt levels will drive the Company's Regulatory Plan financial ratios lower, and thereby increase the amount of the necessary amortizations to maintain Empire at investment grade credit ratings.[82]

Except for a question relating to the quantification of the amount of Empire's total electric operations investment supported by debt, the OPC supported Staff's changes, which it understood Staff would file as part of its true-up testimony.[83] OPC expected a change to reflect additional investment in excess of rate base. The primary investment related to Missouri electric operations that is not contained in rate base is construction work in progress ("CWIP"). OPC believed it appropriate to add CWIP to rate base prior to synchronizing the Missouri electric operations investment with the capital structure. OPC took the position that the CWIP balance should be reduced by the amount of short term debt used in the additional amortization calculation. Other than CWIP and short-term debt, OPC is unaware of other such items in Empire's balance sheet not already included in rate base that should be reflected as part of Empire's electric operations investment. If a prudent investment in Missouri electric operations is recorded in the future, it should be reviewed for inclusion in the additional amortization calculation. Under the Staff's methodology respecting synchronizing Empire's capital structure that should be reflected in Empire's Regulatory Plan amortization calculations, the Staff proposed to add approximately

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[82] Oligschlaeger True-Up at 12-15.

[83] OPC did not have an opportunity to review the revisions as true-up testimony was concurrently filed. OPC expected the changed calculation to increase the amortization to recognize decreased cash flow due to reduced deferred income tax resulting from treating the amortization as additional book depreciation expense. The reduction in cash flow creates a need for additional amortization to meet the financial metrics in the Regulatory Plan. OPC also expected and supported Staff's changes to revise the calculation format so the investment in Missouri jurisdictional retail electric operations in properly synchronized with the capital structure, which is required to preclude cash flow to operations other than Missouri retail electric operations.

$61.9 million reflecting all of Empire's net balance sheet items (assets minus liabilities) not included in Empire's regulatory rate base, which included, but was not limited to CWIP (an asset) and short-term debt (a liability), to Empire's combined rate base/balance sheet net investment. OPC proposed to add approximately $31.7 million, which was derived by adding Empire's net balance of CWIP less short-term debt as of June 30, 2007, to Empire's electric rate base. The Staff, OPC, and Empire agreed to add $30.0 million to Empire's combined rate base / balance sheet net investment in settlement of this particular question.[84]

Empire specifically refrained from addressing the issue of amortizations in its true-up testimony and no other party has taken a position on the issue. In addition, it appears the parties involved in this issue are all now treating the Elk River Wind Farm agreement as a purchased power agreement.

Finding: The Staff, OPC, and Empire filed a Nonunanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations that was objected to by the Industrials. We find the Staff's methodology for calculation of the regulatory plan amortizations to be correct, including the use of the S&P valuation of off-balance sheet obligations without further adjustment and accept the Staff's, OPC's and Empire's resolution of synchronizing Empire's capital structure that should be reflected in Empire's Regulatory Plan amortization calculations. We find that the adjustment recommended by the OPC in this regard would result in an unreasonably low valuation of the off-balance sheet obligations and thereby would tend to defeat the purpose of the amortization.

Conclusion: Pursuant to 4 CSR 240-2.115(2)(D), the Nonunanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations became a position of the signatory parties. The Commission concludes that the Staff's position on off-balance sheet obligations is reasonable and appropriate. As to the other sub-issues of regulatory plan amortizations, the Staff has revised its position and recalculated the amounts to be included in the regulatory plan amortizations. Having reviewed those revisions, the Commission finds the Staff's methodology, including the Staff's, OPC's and Empire's synchronizing Empire's capital structure that should be reflected in Empire's Regulatory Plan amortization calculations, as applied to the Commission's findings herein, to be reasonable and otherwise appropriate.

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[84] Trippensee True-up at 2-5.

5. Fuel and Purchased Power Expense: What is the appropriate level of on-system fuel and purchased power expense Empire should be allowed to recover in rates?

Empire uses a variety of fuel sources to generate electricity, and the fuel costs at issue in this matter include not only the market price of the fuel used in power plants, but the costs associated with obtaining that fuel.[85] In instances in which Empire's costs of generating electricity are greater than the cost of buying electricity generated by another company or if Empire's power needs exceed its generation capacity, Empire may purchase power from another provider. If Empire generates more power than its customers need, then it can sell that power through off-system sales. Those off-system sales are included in the revenue requirement elsewhere as discussed above, and are not included as an offset to fuel and purchased power costs.[86]

The costs of many of the fuels Empire uses to generate power have risen due to causes both foreseen and unforeseen. Fuel prices are generally increasing,[87] but certain circumstances have created more erratic price increases, resulting in a highly volatile market for most fuel sources, but especially for natural gas. A train derailment in May 2005 constrained the movement of coal out of the Powder River Basin in Wyoming, and Hurricanes Rita and Katrina significantly disrupted natural gas supply from the Gulf Coast.[77] Empire has significant dependence on natural gas and exposure to natural gas price volatility. Although Empire has diversified its fuel mix for the generation of electricity, it still expects to burn approximately 10 million MMBtu in a "normalized" year.[78] At such consumption levels, a ten cent change in the price of natural gas per MMBtu results in a $1 million change in fuel costs.[79]

For ratemaking purposes, Empire's total fuel costs are computed using a modeling program that ascertains, based on which generating units are used for a given duration throughout the year, what the total fuel costs will be. As Empire is so heavily dependent on natural gas, the anticipated price of gas figures prominently in the calculation. The difference in the forecasted price of natural gas is the reason that the position taken by the Industrials is so far afield from the positions taken

[85] As an example, see Fischer Direct at 22.
[86] Fischer Direct at 29.
[87] See Choe Rebuttal Schedule 2.
[77] Tarter Direct at 12.
[78] Tarter Surrebuttal at 3.
[79] Tarter Surrebuttal at 3.

by other parties on this issue, and the reason the OPC position differs slightly from Empire's and the Staff's positions.

There is another small reason for the different results of Empire and the Staff. Although they use the same model, they differed slightly on other inputs to the model than just the price of natural gas, such as transportation costs. However, the price of natural gas is the main factor in the differences in the projected fuel cost. No party involved in this case can predict, with any accuracy, the price for natural gas in the coming year. As the Commission is convinced that the spike in natural gas prices in 2005 was an aberration, looking to the test year for guidance on the appropriate level of fuel and purchase power cost would be unreasonable.

Under the previous rate case, in which the fuel and purchased power issue was resolved by the 2005 Stipulation as discussed above, $103 million (Mo jurisdictional) was included in base rates and $8 million (Mo jurisdictional) was recoverable through an interim energy charge ("IEC") that could fluctuate within limits. If the fuel price was below the minimum, refunds would be made to customers; if the fuel price was above the upper limit, Empire would simply bear the cost without recourse to recovery of those costs in rates.[80]

Empire asserts that the fuel costs it incurred have been prudently incurred. Although the actual numbers for its hedging program are classified in this case as highly confidential, it can be said that Empire has implemented a sound hedging program that is effective in ameliorating the volatility of natural gas prices.[81] This is not to say that Empire will never have to buy gas on the spot market, as Empire does not hedge 100% of the most it could ever need. Empire's present plan to hedge approximately 80% of anticipated need for a weather-normalized year is both proper and prudent.

In addition to the new hedging program, Empire has engaged in other activities to mitigate the volatility of natural gas prices. During periods of high volatility, Empire's energy traders are staffed to cover extended hours in an effort to find the most economical power available on an hourly basis. During summer of 2005, when fuel oil was less expensive than natural gas, Empire burned fuel oil in some of its dual fuel units. Since October 2005, Empire has been receiving power from

[80] Commission Case No. ER-2004-0570.
[81] Tarter Direct at 14-15.

the Elk River Wind Farm. Finally, Empire has signed a letter of intent to be a partner in the Iatan 2 coal-fired generation facility.[82]

Empire proposes an annual total company fuel and purchased power expense including demand charges of $166,956,600 ($137,839,369 Missouri jurisdictional) or $30.95/MWh.[88] This amount is comprised of total variable fuel and energy costs from the production cost model run of $142,034,100 with the remaining $24,922,500 assigned to purchase demand charges, natural gas firm transportation charges and other on-system fuel-related charges.[83] The Staff proposes a fuel and purchased power expense of $161,981,643[84] ($135 million Missouri jurisdictional), only $3 million less Missouri jurisdictional revenue than Empire.[85] OPC proposes a fuel and purchased power expense of $164,804,530,[86] close to mid-way between Staff and Empire. The Industrials did not run a fuel model, but based on its fuel price input, would propose a fuel and purchased power expense of $133,249,000 ($109 million Missouri jurisdictional),

Empire asserts that, since the rates from the last rate case were put into effect, it has expended fuel costs in excess of the amount it may recover in rates by over $18 million.[87] Throughout the record, this amount is loosely referred to as a “loss.” It is not a loss in the traditional sense, as Empire operated at a profit during all times at issue in this matter. The total company fuel cost is one of the most significant elements making up Empire’s revenue requirement. Empire has and is expected to continue to under-recover fuel costs if the 2005 Stipulation is left in place.

Finding: We do not find the Industrials’ position on fuel and purchased power expense to be credible. Although there is no way to accurately predict what fuel prices will do,[88] the fuel prices used by the Industrials do not appear to be consistently derived from actual, spot or futures prices, nor do they appear to be appropriately normalized for weather.[89]

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[82] Tarter Direct at 14.
[88] Transcript at 1219.
[83] Keith True-Up at 9, Exhibit No. 145.
[84] Oligschlaeger True-Up at 3.
[85] Keith True-up at 9.
[86] Transcript at 699.
[87] Transcript at 934.
[88] See Choe Rebuttal at 3-6, Busch Supp. Direct at 3.
[89] Tarter Rebuttal at 9,10: Brubaker Surrebuttal at 9.

Having eliminated the position of the Industrials as not credible, the highest model run for the Missouri jurisdiction is only $3 million from the lowest. The remaining positions are Empire, which ran its own model; the OPC, which ran Empire's fuel model but substituted a different natural gas price; and the Staff, which ran its own fuel model. Having reviewing the differences in model inputs between the Staff and Empire, we find Empire's inputs to be more credible than the Staff's. Empire has a greater familiarity with the intricacies of its system and facilities and is better able to know which facilities require certain fuel ratios, which facilities are used for peaking or based load and all the other myriad inputs into the fuel model.

Conclusion: Having considered the prices and methodologies of the Industrials, OPC, Staff and Empire in developing their positions, the Commission concludes that Empire's is reasonable and most likely to accurately predict its annual fuel costs.

6. Fuel and Purchased Power Expense Recovery Method: What method should be used for recovery by Empire of its fuel and purchase power expense? Alternatively, should the Commission continue to enforce the 3-year term of the Interim Energy Clause that was approved by the Commission in Case No. ER-2004-0570? Is the Commission barred from terminating the Interim Energy Clause by Section 386.266.8? Relying upon the four corners of the Stipulation and Agreement, are the terms of the IEC ambiguous? In the event that the Stipulation and Agreement is found to be ambiguous, do Empire's actions demonstrate its belief that it was bound to a 3-year term? What is the practical construction that Empire has given to the agreement? What is the burden of proof of ambiguity and on whom does it rest? What is the significance of a burden of proof? Has Empire properly applied to terminate the Interim Energy Clause, approved by the Commission in Case No. ER-2004-0570? What standard should the Commission apply in deciding whether to prematurely terminate the IEC? What would be the extent of Empire's financial harm if it were bound to the remaining term of the IEC? What is the comparative financial harm that would be experienced by the ratepayers if the Stipulation and Agreement were prematurely terminated? In the event that Empire is permitted to prematurely terminate the Interim Energy Clause, what amount of revenues collected by Empire under the IEC should be refunded to customers?

As discussed above, many of the parties entered into a Stipulation and Agreement to settle the fuel and purchased power issues

in the previous rate case. Consideration having been given and received, that agreement, referred to as the 2005 Stipulation, appears to be a binding contract among the signatory parties. It is unambiguous in its requirement that Empire may not, during the term of the IEC portion of the agreement, seek any other kind of fuel adjustment recovery mechanism. For that reason, Empire's tariff filings and supporting testimony concerning an "Energy Cost Recovery" mechanism were stricken and will not be addressed in this order.

The 2005 Stipulation established a set amount of fuel and purchased power recovery in base rates, with an additional amount recoverable through an additional charge, within fixed limits. If the fuel and purchased power costs fell within this "collar," Empire could recover them. If fuel and purchased power costs were below the collar, then Empire would refund a certain portion to ratepayers. If fuel and purchased power costs were above the collar, then Empire would absorb those costs. The 2005 Stipulation anticipated that the "IEC Period" would last for a maximum of three years from the date on which it was approved, unless earlier terminated by the Commission.

The 2005 Stipulation does not "lock" Empire into a limited amount of Missouri jurisdictional fuel recovery ($102,994,356 in base rates and $8,249,000 through the IEC) for three years because the 2005 Stipulation contains no "moratorium" language. In other words, the 2005 Stipulation does not prohibit Empire from filing a rate case at any time to seek recovery of all of its costs, including fuel and purchased power costs, through base rates. Likewise, the 2005 Stipulation does not prohibit a proper party from filing a complaint with the Commission against Empire at any time concerning the Company's rates and charges, including those rates and charges concerning the recovery of fuel costs. Further, the 2005 Stipulation contemplates that the Commission might terminate the IEC at some time other than the end of the agreed-to expiration date. The Commission's obligations to ensure just and reasonable rates cannot be constrained by an agreement among the parties. There is no evidence in the record that would permit the Commission to modify the 2005 Stipulation to allow for recovery of all prudently incurred fuel and purchased power costs. On the contrary, the consensus appears to be that the Commission does not have authority to modify it.[90] Likewise, no evidence was given for ways to adjust other

[90] See the Notice Requiring Filing issued on September 20, 2006 and the responses thereto.

parts of the revenue requirement equation to offset the under-recovery of fuel and purchased power costs. The Commission may retain the 2005 Stipulation as it is or terminate it prior to its scheduled expiration. The 2005 Stipulation does not allow sufficient recovery of Empire's prudently incurred fuel and purchase power costs by $26.8 million annually.

There are several questions set forth in the description of this issue that pertain to Empire's actions concerning the 2005 Stipulation: whether by its action or inaction it ratified the 2005 Stipulation, whether it may properly seek termination, or whether the 2005 Stipulation is unambiguous. The 2005 Stipulation appears to be a contract that binds the signatories unambiguously to its terms. As stated above, however, the terms do not prohibit Empire from seeking rate relief during the three year period, and the terms do specifically recognize that the Commission may terminate the IEC within the three-year period.

In discussing whether the Commission is bound by or to its prior decisions, the Missouri Supreme Court quoted an Illinois case and concluded as follows,

> "The construction contended for seems to be in conflict with the act. One of its primary purposes was to set up machinery for continuous regulation as changes in condition require. It appears to be inherent in the act itself." The statute of Illinois is different from that of Missouri, but we think the "spirit of the act" analysis is logical and should be the standard in this state. In fact, this court said in *State ex rel. Chicago, R.I. & P.R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (1958): "Its [Commission's] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem in the public interest." To rule otherwise would make §393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to ratepayers. *** Since the very purpose of having the Commission is to have an agency with such expertise as to be sensitive to changing conditions, we rule the trial

> court was in error in rejecting the Commission's action in that regard.[91]

In its September 20, 2006 response to a Commission notice, the Industrials asserted:

> Nevertheless, to the extent that Empire is permitted to prematurely terminate the IEC, the Commission would be undertaking the judicial role of rescission of a contract. Consistent with contract law, courts undertaking such rescission would seek to return the parties to their positions prior to the contract. This would involve a return of all previously exchanged consideration. As such, other changes to the Stipulation and Agreement that would be necessary would be to return the entire amount of IEC revenues collected up to the point of rescission.[92]

We are not persuaded by this argument. It is clear under Missouri law that the setting of just and reasonable rates must be of utmost importance to the Commission. We look to a Missouri Supreme Court case from 1930, in which the Court handed down the following bits of wisdom:

> The fixing of public utility rates being an exercise of the police power of the state, it must follow that the Legislature could not by contract, statutory enactment, or otherwise limit or abridge the right of the state to fix reasonable rates for public service, because to do so would be to abridge the exercise of the police power of the state, a thing which the Constitution prohibits. This proposition is so well settled by numerous decisions of this court that nothing more need be written on this subject.
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> In determining whether or not the franchise contract precludes the Public Service Commission from taking cognizance of the company's application for increase in

[91] *State ex rel. Jackson County, et al. v. Public Service Commission,* 532 SW2d 20, 29 (Mo Banc, 1975).
[92] Response of Praxair/Explorer to Commission Notice Requiring Filing, filed September 20, 2006 at 3.

rates, and conducting an investigation to determine whether the rates fixed by the franchise ordinance are reasonable, three well settled propositions of law must be kept in mind: (1) That the fixing of reasonable rates to be charged by the utility for public service is the exercise of the police power of the state; (2) that the Legislature can delegate the exercise of that power to a body created by it; and (3) that, by the passage of the Public Service Commission Act, the Legislature did delegate that power to the Public Service Commission, and under the power so delegated the commission may at any time, on its own motion or on complaint, conduct a hearing for the purpose of determining whether or not the rates charged by a utility for the service it renders to the public are just and reasonable to both the utility and the public.

* * *

This brings us to the vital question in the case, and that is, whether or not the rates fixed by the franchise contract are subject to future regulation by the Commission.

* * *

The contention is that, after the commission approved the contract, the rates fixed thereby were not subject to regulation or change […].

* * *

If the statute be given that construction, it would abridge the exercise of the police power of the state in the fixing of reasonable rates and for that reason would be unconstitutional.

* * *

Every utility is entitled to charge a rate that will produce a reasonable net income on the fair value of its property after deduction for depreciation and necessary expenses incident to operation.

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If, as we have held, a municipal corporation may not by contract fix and regulate utility rates, it must follow that it cannot by contract, fix and regulate the factors which

> determine such rates, and thus accomplish by indirection what the law prohibits it from doing directly.
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> * * *
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> The commission has exclusive power to determine and fix reasonable rates irrespective of the rates fixed by the franchise ordinance, but it has no jurisdiction to construe or enforce the contract as to extension of car lines, street paving, etc., or to try to determine an alleged breach thereof. When the application for increase in rates was filed with the commission, it was the official duty of the commission to determine and fix just and reasonable rates of fare, and leave the construction and enforcement of the contract to a court having jurisdiction to determine such matter. [cites and notes omitted][93]

The case quoted above is uncannily on point. In the present matter, the utility and other entities limited by contract the amount of recovery of the utility's major expense. The contract was submitted to and approved by the Commission.[94] Upon discovery that it was significantly under-recovering its cost, the utility asked the Commission to establish rates that would permit it to fully recover its reasonably incurred costs. The other parties to the contract asserted that the contract precludes the utility from recovering the costs that were limited by the contract.

It is important to note that the terms of the 2005 Stipulation specifically provided that it could be terminated by the Commission before it expired:

> The IEC tariff or rate schedule will expire **no later than** 12:01 a.m. on the date that is three years after the original effective date of the revised tariff sheets authorized by the Commission in this case, Case No. ER-2004-0570, **unless earlier terminated by the Commission.** [emphasis added, page 4]

[93] *State ex rel. Kansas City Public Service Company v. Latshaw,* 30 SW2d 105, 107-110 (Mo Banc 1930).

[94] For an exhaustive discussion on whether such approval raises equitable estoppel issues, see *State ex rel. Capital City Water Co. v. Missouri Public Service Commission,* 850 SW2d 903 (Mo. App. 1993).

Therefore, the Commission need not address the issues surrounding the contractual relations between Empire and the other signatories to the 2005 Stipulation. The Commission must determine just and reasonable rates based on what it deems to be Empire's prudently incurred costs. To the extent that the 2005 Stipulation limits recovery of Empire's prudently incurred fuel and purchased power expenses, then it attempts to limit one of the "factors which determine rates" and is overcome by the Commission's exercise of the police power granted to it. The Commission's prior approval of the 2005 Stipulation in no way estops or hampers it in its determination of just and reasonable rates. Empire may recover the prudently incurred fuel and purchased power costs at the level determined above in base rates.

This Commission has the duty to ensure that rates are just and reasonable in a manner that will allow a utility to adequately recover its costs. The Commission cannot set rates at a level that could place a utility in serious financial jeopardy. Further, without adequate revenues, a utility cannot ensure safe and adequate service for its customers. Whatever limitation, if any, the terms of the 2005 Stipulation may have placed on Empire's ability to seek termination of the IEC within the three-year period, the terms of the 2005 Stipulation do not limit the Commission's ability to terminate the IEC if such action is in the public interest. The existing IEC agreement has and will continue to create a significant under-recovery of costs for Empire because of the volatility of natural gas prices that was unforeseen at the time the IEC agreement was reached. This Commission cannot abrogate its duty to both the utility and its customers simply because some of the parties have previously reached a Stipulation and Agreement that addresses the issue of fuel costs to the serious detriment of the utility. Given our statutory mandate, the Commission must set rates that are just and reasonable and that may better ensure Empire's solvency and its ability to provide safe and adequate service to its customers.

As to the question of refunds to customers set forth in the issues list, we have found that during the test year, Empire under-recovered its prudently incurred fuel and purchased power costs. Therefore, any refund to customers of amounts collected pursuant to the 2005 Stipulation would be unreasonable and unjust in that it would exacerbate the under-recovery.

Finding: The Commission finds that the terms of the 2005 Stipulation specifically recognize that the Commission may terminate the IEC prior to the expiration of the agreed-upon maximum term. The

Commission also finds that the IEC established by the 2005 Stipulation has prevented Empire from recovering prudently incurred fuel and purchased power costs of approximately $24 million, and, therefore, has deprived Empire of the opportunity to earn a fair and reasonable return on the value of the assets it has devoted to the public service. The Commission further finds that these results will likely recur if the IEC remains in place.

Conclusion: The Commission concludes that it need not address the issues surrounding the contractual relations between Empire and the other signatories to the 2005 Stipulation and that the terms of the 2005 Stipulation specifically recognize that the Commission may terminate the IEC. The Commission concludes that it must determine just and reasonable rates based on what it deems to be Empire's prudently incurred costs. To the extent that the 2005 Stipulation limits recovery of Empire's prudently incurred fuel and purchased power expenses, then it attempts to limit one of the "factors which determine rates" and is overcome by the Commission's exercise of the police power granted to it. Moreover, the Commission concludes that its prior approval of the 2005 Stipulation in no way estops or hampers it in its determination of just and reasonable rates, and that continuation of the IEC under these circumstances would not be consistent with the public interest. The Commission concludes that Empire may recover the prudently incurred fuel and purchased power costs at the level determined above in base rates.

7. Gain from unwinding forward natural gas contract: Should Empire's gain from unwinding a forward natural gas contract during the test year offset test year fuel and purchased power expense? If so, should the entire gain be an offset in the test year, or should it be amortized and only a portion of the gain be applied as an offset in the test year?

This issue concerns the transaction to undo (referred to as "unwinding") a portion of a long-term natural gas contract between Empire and British Petroleum that had locked in the price of natural gas deliveries scheduled to take place in the summers of 2009, 2010 and 2011. The positions were closed to market and Empire recorded a gain of slightly over $5 million.[89]

Some of the parties differ on how this should be recorded on Empire's books. Empire believes that, as the transaction was in the past and is of a non-recurring nature, it should be used to offset the under-recovery of fuel and purchased power expenses that occurred in the same year as the unwinding.[90] The Industrials assert that, since these were forward positions, the benefit of the transaction should flow through to retail customers. They assert that the "net impact of reflecting this gain along with current forward prices for unhedged natural gas volumes is to decrease Empire's claims by approximately $12 million per year."[91] The Staff recommended that gain be amortized over a five-year period and netted against fuel expense, noting that Empire's hedging program directly related to provision of regulated electric service. As the gain from unwinding this contract was exceptionally large, the Staff recommended "smoothing [it] out" over five years.[92] Empire seeks to use the gain from the unwinding to directly offset the under-recovery of fuel and purchased power costs, as the unwinding and under-recovery occurred in the same year.[93]

Finding: The Commission agrees that the transaction was of a non-recurring nature, that it was clearly within the category of fuel costs, and that it occurred in the same time period as an under-recovery of fuel costs. It seems reasonable that a gain in the fuel category should offset a loss in the fuel category of roughly the same time. We do not find the Industrials' position to be reasonable, in that it multiplies the effect of the

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[89] Keith Rebuttal at 2-3.
[90] Keith Rebuttal at 4-8.
[91] Brubaker Direct at 11-12.
[92] Fischer Direct at 20.
[93] Keith Rebuttal at 4-5.

transaction in a way unfair to Empire. Although the Staff's suggestion for an amortization does smooth out the transaction, we do not believe it is appropriate in this instance to do so.

Conclusion: The Commission concludes that the most reasonable approach to this issue is to allow Empire to use the gain to directly offset the under-recovery of fuel and purchased power costs.

8. Incentive Compensation: Are all the costs of Empire's incentive compensation plan an expense Empire should recover from Empire's ratepayers? If not, what costs should be recovered?

Empire has three incentive compensation plans. For officers, there is the management incentive compensation plan; for salaried non-officer employees, there is a discretionary compensation incentive award; and for certain other employees, there is a program that offers certain lump-sum payments in the nature of bonuses called "Lightning Bolts."

In its disallowance of a portion of the incentive compensation Empire pays its employees, the Staff applied what it views as straightforward criteria: At a minimum, an acceptable management performance plan should contain goals that improve existing performance, and the benefits of the plan should be ascertainable and reasonably related to the plan.[94] In addition, the Staff excluded incentive payments for goals related to financial performance because these goals primarily benefit the shareholder.[95]

In its review of Empire's costs of providing electric service, the Staff included the entire amount of the base salary in payroll. For incentive pay, the Staff used criteria espoused in a previous Commission order[96] to analyze the goals on which the incentive pay was contingent. To be included in cost of service, Staff asserts that incentive compensation should be the result of employees performing beyond basic job requirements and provide a benefit to ratepayers. The Staff eliminated awards pertaining to earnings goals, as those primarily benefit shareholders, not customers. The Staff also eliminated payment for goals related to non-regulated activities. The Staff eliminated the cash

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[94] *Report and Order* in Case Nos. EC-87-114 and EC-87-115, Union Electric Company, 29 Mo.P.S.C. (N.S.) 313, 325 (1987).

[95] *Report and Order* in Case No. GR-96-285, Missouri Gas Energy (MGE), 5 Mo.P.S.C.3d 437, 458 (1997).

[96] *Report and Order* in Case No. GR-96-285, Missouri Gas Energy (MGE), 5 Mo.P.S.C.3d, 458 (1997).

incentives paid out relating to goals in which the results were over-budget or past the scheduled completion date.

The Staff eliminated all expenses for stock options during the test year, as they are granted with no increase in duties or goals and no measurement as to whether any specific goals were met. These stock options accumulate dividend equivalents, which Staff asserts are intended to focus executives' efforts on dividend maximization, with no direct connection to improvement in operating performance or quality of service to the ratepayer. Therefore, the Staff asserted that the stockholders should bear those costs; the Staff excluded costs for performance shares for the same reason.

As to discretionary compensation incentive awards for salaried non-officer employees, the Staff allowed recovery of a portion of this program's costs. In some instances, employees received awards for objectives that were already part of the employees' job duties and some employees received awards for objectives unrelated to their jobs, such as running the United Way campaign. Based on the sample provided by Empire, the Staff calculated a percentage of awards that compensated for performance of normal job duties as opposed to the percentage related to charitable activities and activities related to the provision of services other than retail electric service, then applied that percentage to the total discretionary pool awarded to employees. The Staff disallowed the resulting amount from the cost of service recoverable in rates.

Finally, as to the Lighting Bolts incentive compensation program, the Staff disallowed these awards, as they did not relate to the provision of electric service, but related to such activities as working on the United Way Campaign and the Aquila United, Inc. gas property acquisition, or were for performing normal duties. Moreover, the Staff notes that there were no performance criteria for receipt of the awards; they were given solely at the Company management's discretion.[97]

Empire counters that it is reasonable and prudent to have three components of executive pay: annual base salary, annual bonus, and a long-term incentive. With non-executive employees, Empire has found it increasingly important to have a portion of compensation tied to key company objectives. Empire notes that, with respect to the total compensation package for executives, Empire places total cash compensation at the 25th percentile and total direct compensation near the 38th percentile of the average compensation at a peer group of

[97] McMellen Direct at 9-17.

companies.[98] Empire notes that variable pay is a primary component of a performance-based work culture.[99] Empire agrees that some of the objectives for which it gives performance-based compensation may be within the normal scope of an employee's duties. It asserts that if it were to roll the incentive-based compensation for those duties into the base salary, the Staff would not object to the higher base salary. It would remove "an effective driver of performance and achievement," which may "prevent an employer from operating as effectively and efficiently as possible."[100] On the other hand, Empire could just as easily re-write its job descriptions in such a way that clarifies what level of performance is compensated by base pay and what additional performance merits incentive compensation. If that additional performance relates to the provision of retail electric service in Missouri, the Staff would not disallow it.

There are sound reasons to use incentive pay. The Commission does not agree with the Staff that the spread of incentive-based compensation is a slippery slope, but does understand the Staff's discussion of the use of objective criteria that it can apply even-handedly. No other party took a position on this issue.

Finding: The Commission finds that the Staff reasonably applied objective criteria for exclusion of certain incentive compensation. The Staff disallowed compensation related to charitable activities and activities related to the provision of services other than retail electric service. The Staff disallowed the Lighting Bolts incentive compensation, as they did not relate to the provision of electric service and there were no performance criteria for receipt of the awards; they were given solely at the Company management's discretion.

Conclusion: We conclude that incentive compensation for meeting earnings goals, charitable activities, activities unrelated to the provision of retail electric service, discretionary awards, and stock options should not be recoverable in rates.

9. Low Income Assistance Program: Should Empire's Experimental Low-Income Program (ELIP) be continued with changes? If so, what should those changes be, should the Customer Program Collaborative (CPC) determine those changes and have oversight responsibility respecting the program, and how should the cost

[98] Bauer Rebuttal at 7-9.
[99] Bauer Rebuttal at 11.
[100] Bauer Rebuttal at 9.

of the program be included in Empire's cost-of-service for collection from ratepayers? What should be done with unspent ELIP funds?

On April 24, 2003, after a successful collaborative process to develop and implement an experimental rate discount program targeted to low-income customers in Empire's Joplin service area, the Commission approved tariff sheets that established the experimental low-income program ("ELIP"). Qualifying low-income program recipients with a household income of up to 50% of the Federal Poverty level receive bill discounts of $40. Program recipients with a household income of 51% to 100% of the Federal Poverty level receive bill discounts of $20. The discounts are available for up to 24 months under the current tariff.

The ELIP is funded by a shareholder contribution of $150,000 and a ratepayer contribution of $150,000 annually, for a total annual budget of $300,000 annually.

The OPC notes that the program costs in each year have fallen far short of the total $300,000 annual allotment, never exceeding $150,000. The total discounts applied appear to have fallen dramatically in the first quarter of 2006 to less than $15,000. The OPC asserts that the funding level should be reduced and the following steps should be taken to increase customer participation: modify the eligibility criteria to extend participation beyond 24 months, with the expectation that extending the length of participation maintains the previous level of annual expenditures rather than increasing it and earmark $2,000 annually for outreach, with the expectation that the collaborative group that created the program could develop recommendations on potential outreach methods.

The OPC also supports increasing the level of support for the poorest families to $50 monthly, increasing the maximum qualifying household income to 125% of the federal poverty level, and allocating up to $30,000 of existing program funds to add an experimental arrearage repayment incentive to the program. A flexible, simple to understand arrearage repayment incentive is likely to benefit Empire's entire customer base by encouraging a greater level of repayment, and is consistent with the program's goals.

Finally, the OPC recommends that the ratepayer contribution be reduced by $100,000 annually, or if the program is not modified, the ratepayer contribution should cease. If the program is terminated, OPC asserts that the balance should be refunded to ratepayers instead of to ProjectHelp for helping elderly and disabled Empire customers with

emergency energy-related expenses, and that interest should be paid to ratepayers of any unspent fund balance.[101]

Empire suggests ending the program and asking the collaborative group for guidance on use of the unused fund balance.[102] The Staff believes that the ELIP should be eliminated and the funds redirected to the low-income weatherization program, which the Staff believes is a more effective and lasting way to reduce energy bills for low-income families than the ELIP.[103] The Staff notes that the weatherization program is currently funded at $155,000 annually, and the entire amount is being used. However, the Staff believes that the collaborative group is best suited to determining where the fund dollars can be most effectively spent, and would refer the matter to that group for final allocation.[104]

While the Staff makes a sound argument that weatherization and other energy-saving methods provide a more long-term benefit to low-income customers, it would be unreasonable to require all low-income customers to weatherize their homes instead of, or as a prerequisite to, receipt of ELIP assistance. Many low-income customers rent their homes. The suggestion that landlords be required to weatherize or at least apply for weatherization assistance is beyond the control of tenants and unreasonable.

If the ELIP is terminated, the presently effective tariff provides that the unspent balance will be delivered to ProjectHelp. The transfer of such a large balance would be unreasonable. The funds should be redirected to another demand-side management program for low-income customers. The Commission will require that change when Empire files its tariffs in compliance with this order.

The OPC's suggestions have merit, except that the funding level shall not be reduced at this time. The Commission expects the collaborative group to make a recommendation as to the funding levels of both the ELIP and the demand-side management programs discussed below. If the collaborative group recommends a change, then Empire may propose a tariff change.

Finding: The Commission finds that the ELIP is a reasonably effective program. If the program were terminated in this case, the presently effective tariff provides that the unspent balance will be

[101] Meisenheimer Direct at 13-19.
[102] McCormack Rebuttal at 4.
[103] Empire does not oppose this. See McCormack Surrebuttal at 2.
[104] Mantle Rebuttal at 3-4.

delivered to ProjectHelp, an unreasonable result. As all the witnesses on this topic noted, the collaborative group is the appropriate body to design changes to the program for Commission approval. The OPC makes several suggestions for improvement to the program, all but one of which the Commission finds have merit.

Conclusion: The Commission concludes the OPC's suggested changes shall be made, except that the level of funding will not be altered at this time. The Commission will not terminate the ELIP at this time. The collaborative group shall make a recommendation as to the funding levels of both the ELIP and the demand-side management programs discussed below. If the collaborative group recommends a change, then Empire may propose a tariff change. In any event, Empire shall revise its tariff to clarify that, if any of its energy assistance or demand-side management programs is terminated, any unspent funds will be redirected to the remaining program(s). The Commission will require that change be made when Empire files its tariffs in compliance with this order.

10. Unspent Funding of Current Energy Efficiency and Affordability Programs: What should be done with unspent funds from the current energy efficiency and low income weatherization programs? What should be the amortization amount respecting the demand side management (DSM) regulatory asset account?

Demand-side management programs are those that help utility customers reduce their demand. Weatherization programs, conversions to energy-efficient appliances and changing lights from incandescent to compact fluorescent are all examples of demand-side management.

Staff notes that the funds in question were collected entirely from ratepayers. Staff recommends that any unspent funds be placed as a negative amount in the demand-side program account for future demand-side programming.[105]

Empire proposes the following accounting treatment:

> Costs of $53,000 associated with the CPC and new DSM and affordability programs to be funded in 2006 have been included as a regulatory asset in rate base. This amount included $10,000 for the Missouri Residential Market Assessment, approximately $41,500 for AEG's consulting work and approximately $1,500 for travel and related expenses. Furthermore, an

[105] Mantle Rebuttal at 5.

> adjustment to increase expenses of $5,300 has been included in the income statement. This adjustment reflects the amortization of the regulatory asset over ten years in accordance with the Stipulation and Agreement reached in Case No. EO-2005-0263.[106]

The Staff agrees with Empire's approach, but would alter the amounts to reflect actual costs incurred.[107]

Finding: The Commission finds that the Staff and Empire's accounting methodology is reasonable, but shall reflect actual costs incurred, provided that the same level of funding is dedicated to the programs and that any unspent balance remains dedicated to the programs.

Conclusion: The Commission concludes that these programs, lawfully in place, are valuable and likely to make a lasting difference in the energy bill burdens shouldered by low-income customers. Therefore, the Commission concludes that the Staff's recommendation concerning the continuity of these programs and their accounting treatment is reasonable and will be adopted.

11. Corporate Allocations (True-Up Issue)

Empire experienced significant changes to its corporate structure during the true-up period of this proceeding. Mark Oligschlaeger provided testimony on this issue for Staff, W. Scott Keith provided testimony for Empire, and Russell W. Trippensee provided testimony for OPC on this issue. On June 1, 2006, Empire completed its acquisition of Aquila, Inc.'s Missouri natural gas properties and formed a new subsidiary to operate Empire's new gas business. This change affects Empire's corporate allocations on a going-forward basis.[108] While Staff testified that there should be few direct impacts on Empire's electric operations as a result of this change, Staff also testified that the change causes a reduction in the percentage of administrative and general (A&G) costs otherwise allocable to Empire's electric operations.[109]

Testimony was provided regarding the "Massachusetts Formula" analysis of the amounts in revenue, plant in service, and payroll costs experienced by Aquila, Inc.'s former Missouri gas properties in calendar year 2005, compared to these same items for Empire's pre-existing electric, water and non-regulated operations for the same period of time.

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[106] McCormack Direct at 4-5.
[107] McMellen Rebuttal at 2.
[108] Oligschlaeger True-Up at 6-7.
[109] Oligschlaeger True-Up at 7.

This analysis revealed that Empire's gas properties, all other things being equal, were estimated to make up approximately 9.37% of Empire's total utility operations.[110] Empire proposed use of this number, while Staff suggested certain adjustments.

After the filing of true-up testimony, the parties engaged in settlement negotiations, and Empire, Staff, and OPC entered into and filed herein a Stipulation and Agreement Regarding Corporate Allocations. The Industrials objected to this Stipulation, and, by operation of Commission rule 4 CSR 240-2.115(2)(D), this Stipulation was considered to be a non-binding statement of position by the signatory parties. Empire provided testimony that it expected to realize synergies in excess of increased costs related to the common costs associated with the combined operations of the electric and gas companies.[111] The signatory parties agreed that Empire's revenue requirement in this proceeding should be reduced by $500,000 to reflect the impact on certain test year A&G allocation factors and that Empire's revenue requirement should be reduced by $150,000 to reflect the impact on certain test year general plant allocation factors. At the true-up hearing in this matter, Staff reiterated this position.

Finding: Empire's acquisition of Aquila, Inc.'s Missouri natural gas properties affects corporate allocations in that there should be a reduction in the percentage of administrative and general costs otherwise allocable to Empire's electric operations. Further, the Commission finds that the parties' recommendations, as set forth in the non-unanimous Stipulation and Agreement Regarding Corporate Allocations and supported by the testimony, are reasonable and will result in just and reasonable rates.

Conclusion: As a result of Empire's acquisition of Aquila, Inc.'s Missouri gas properties, Empire's revenue requirement in this proceeding should be reduced by $500,000 to reflect the impact on test year A&G allocation factors pertaining to FERC USOA expense accounts 920 through 935, and that Empire's revenue requirement should be reduced by $150,000 to reflect the impact on test year general plant allocation factors pertaining to FERC USOA plant in service accounts 389 through 398.

[110] Oligschlaeger True-Up Testimony, p. 7.
[111] Keith True-Up, p. 3.

F. The Settled Issues

Four separate Stipulations and Agreements were filed. None were joined by all parties. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.[112] In reviewing that Stipulation and Agreement, the Commission notes that:[113]

> (a) Every decision and order in a contested case shall be in writing, and, except in default cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law with respect to the issues resolved by the Stipulation and Agreement. The Commission convened an evidentiary hearing in this case and the parties presented such evidence as they chose; the requirement of a hearing has been met.

On August 18, 2006, the Staff and Empire jointly filed a Nonunanimous Stipulation and Agreement as to Certain Issues. The issues to which the parties stipulated were: banking fees, outside services, Edison Electric Institute expense, health care expense, life insurance expense, rate case expense, deferred income taxes, Energy Center income statement, Energy Center rate base, state tax flow-through, prepaid pension asset, allocation of taxes other than income taxes, FAS 87 pension costs, other post-employment benefit costs, test period revenue, retirement work in progress, other maintenance costs, cash working capital, growth on sales to municipals, storm damage tracker expense and tariff issues relating to the Experimental Green Power Schedule, Rider EGP, street lighting service charge, tariff section 5, sheets 12-17 and 17a, and tariff sheet header presentation. The Stipulation and Agreement also provided that the testimony of witnesses concerning these issues would be admitted without the witnesses taking the stand to present the testimony or being subject to cross-examination. No party filed a timely objection or request for hearing with respect to this Nonunanimous Stipulation and Agreement. The Commission issued an

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[112] Section 536.060, RSMo Supp. 2004.

[113] Section 536.090, RSMo Supp. 2004. This provision applies to the Public Service Commission. *St. ex rel. Midwest Gas Users' Assoc. v. Pub. Serv. Comm'n*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

Order Approving the Stipulation and Agreement as to Certain Issues on August 28, 2006.

On September 13, 2006, the Staff, the OPC and the Industrials jointly filed a Nonunanimous Stipulation and Agreement Regarding Rate Design Issues. No party filed a timely objection or request for hearing with respect to this Nonunanimous Stipulation and Agreement. The Stipulation and Agreement settled all issues under the Class Cost-of-Service/Rate Design heading in the issues listed by the Parties on August 28, 2006, including the sub-issues. The Signatories agreed that (1) customer charges will not change; (2) that if the IEC is not terminated, any increase in permanent rates the Commission orders in this case, whether or not generated as a result of a regulatory amortization, shall be changed in proportion to each class's percentage of current permanent revenues, as trued-up; (3) that if the IEC is terminated, rates shall be changed, whether or not generated as a result of a regulatory amortization, in proportion to each class's current share of total rate revenues as trued-up, where total rate revenues are equal to current permanent revenues plus the IEC revenues; and (4) that the methodology the Staff employed to determine the rate revenues shown in Schedules DCR-l and DCR-3 attached to the Direct Testimony of Staff witness David C. Roos shall be the methodology used to determine rate revenues for purposes of changing permanent rates. No party filed an objection to the Stipulation and Agreement. Therefore, the Commission may, pursuant to Commission Rule 4 CSR 240-2.115(2), treat it as unanimous. The Commission has reviewed the Stipulation and Agreement Regarding Rate Design Issues filed in this case and is of the opinion that it is just and reasonable and shall be approved.

Two other Stipulations and Agreements were filed, but timely objections were raised to them. They have become, by operation of Commission rule 4 CSR 240-2.115(2)(D), non-binding statements of position by the signatory parties. The issues included in those Stipulations and Agreements have been fully addressed in the Findings of Fact and Conclusions of Law above.

G. Intervening Tariff Sheets

On January 15, 2008, the Commission issued an Order Of Clarification wherein it stated, in part, that it had not intended with its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs to have superseded any tariff sheets approved or becoming effective by operation of law between January 1, 2007 and December 14, 2007:

> On December 4, 2007, the Missouri Public Service Commission issued its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs (December 4 Order) in this case. The order was effective on December 14, 2007.
>
> * * *
>
> By issuing the December 4 Order, the Commission did not intend to replace any of the intervening tariff sheets with the December 28, 2006 tariff sheets. Failing to include clear language in the December 4 Order stating that the intervening tariff sheets should remain in effect and replace any of the corresponding December 28, 2006 tariff sheets was an inadvertent omission. Any suggestion that the Commission superseded the intervening tariff sheets is a misinterpretation of the December 4 Order and the Commission shall clarify the December 4 Order so that there is no question as to the Commission's intent in that regard. The Commission has the authority under the Revised Statutes of Missouri, Section 388.490, to alter its order. Therefore, the Commission hereby clarifies its December 4 Order by stating that the intervening tariff sheets are not to be superseded by the December 4 Order. Rather, the intervening tariff sheets replaced any of the corresponding December 28, 2006 tariff sheets and shall remain in effect as of their individual effective dates. The Commission shall direct its Data Center to make any changes necessary in the Electronic Filing and Information System (EFIS) to reflect the correct effective dates of the intervening tariff sheets.

In its January 15, 2008 Order Of Clarification the Commission did not specifically identify the intervening tariff sheets. The Commission notes that some of these tariff sheets are "Original" tariff sheets and, as a consequence, would not be among the tariff sheets identified in "Ordered 2." in its December 4, 2007 Order Vacating December 29, 2006 Order

Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs. The intervening tariff sheets are as follows:

P.S.C. Mo. No. 5, Section A

22nd Revised Sheet No. 1, Canceling 21st Revised Sheet No. 1:
Table of Contents
Date of Issue: February 5, 2007 Date Effective: March 7, 2007
Case No. EO-2007-0161

P.S.C. Mo. No. 5, Section B

Original Sheet No. 9: *Map and Legal Description*
Original Sheet No. 10: *Map and Legal Description*
Original Sheet No. 11: *Map and Legal Description*
Original Sheet No. 12: *Map and Legal Description*
Original Sheet No. 13: *Map and Legal Description*
Original Sheet No. 14: *Map and Legal Description*
Original Sheet No. 15: *Map and Legal Description*
Date of Issue: February 5, 2007 Date Effective: March 7, 2007
Case No. EO-2007-0161

P.S.C. Mo. No. 5, Section B

Original Sheet No. 16: Description of Service Territory
Original Sheet No. 17: Description of Service Territory
Original Sheet No. 18: Description of Service Territory
Original Sheet No. 19: Description of Service Territory
Date of Issue: October 15, 2007 Date Effective: November 14, 2007
Tariff Filing JE-2008-0238

P.S.C. Mo. No. 5, Section 4

15th Revised Sheet No. 6, Canceling 14th Revised Sheet No. 6
4 CSR 240-3.155 Requirements For Electric Utility
Cogeneration Tariff – Avoided Cost
Date of Issue: January 16, 2007 Date Effective: February 15, 2007
Tariff Filing JE-2007-0480

P.S.C. Mo. No. 5, Section 4

2nd Revised Sheet No. 8a, Canceling 1st Revised Sheet No. 8a
Original Sheet No. 8a.1
3rd Revised Sheet No. 8b, Canceling 2nd Revised Sheet No. 8b
Revisions to Commercial and Industrial Facility Rebate Program

Date of Issue: April 5, 2007 Date Effective: May 7, 2007
Case No. ET-2007-0375

P.S.C. Mo. No. 5, Section 4
Original Sheet No. 8d
Low Income New Homes (Installation of High Efficiency) Program
Date of Issue: February 2, 2007 Date Effective: March 4, 2007
Case No. ET-2007-0297

P.S.C. Mo. No. 5, Section 4
Original Sheet No. 8e
Original Sheet No. 8f
High Efficiency Residential Central Air Conditioning Rebate Program
Date of Issue: May 4, 2007 Date Effective: June 4, 2007
Case No. ET-2007-0428

PSC Mo. No. 5, Section 4
4th Revised Sheet No. 13, Canceling 3rd Revised Sheet No. 13:
Net Metering Rider NM
Date of Issue: July 23, 2007 Date Effective: August 22, 2007
Case No. EO-2006-0497

IT IS THEREFORE ORDERED:

1. That, as stated in the Report and Order issued December 21, 2006, the proposed electric service tariff sheets submitted under Tariff File No. YE-2006-0597 on February 1, 2006, by The Empire District Electric Company for the purpose of increasing rates for retail electric service to customers are rejected. The specific sheets rejected are:

P.S.C. Mo. No. 5, Section A
21st Revised Sheet No. 1, Canceling 20th Revised Sheet No. 1

P.S.C. Mo. No. 5, Section 1
13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1
10th Revised Sheet No. 2, Canceling 9th Revised Sheet No. 2

P.S.C. Mo. No. 5, Section 2
12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1
1st Revised Sheet No. 1a, Canceling Original Sheet No. 1a
12th Revised Sheet No. 2, Canceling 11th Revised Sheet No. 2

12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3
7th Revised Sheet No. 3a, Canceling 6th Revised Sheet No. 3a
13th Revised Sheet No. 4, Canceling 12th Revised Sheet No. 4
8th Revised Sheet No. 4a, Canceling 7th Revised Sheet No. 4a
12th Revised Sheet No. 6, Canceling 11th Revised Sheet No. 6
12th Revised Sheet No. 7, Canceling 11th Revised Sheet No. 7
5th Revised Sheet No. 7a, Canceling 4th Revised Sheet No. 7a
8th Revised Sheet No. 9, Canceling 7th Revised Sheet No. 9
5th Revised Sheet No. 9a, Canceling 4th Revised Sheet No. 9a
7th Revised Sheet No. 13, Canceling 6th Revised Sheet No. 13

P.S.C. Mo. No. 5, Section 3

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1
17th Revised Sheet No. 2, Canceling 16th Revised Sheet No. 2
12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3
12th Revised Sheet No. 4, Canceling 11th Revised Sheet No. 4

P.S.C. Mo. No. 5, Section 4

5th Revised Sheet No. 17, Canceling 4th Revised Sheet No. 17
(Sheets No. 21, 22, and 23 were previously rejected)

P.S.C. Mo. No. 5, Section 5

7th Revised Sheet No. 12, Canceling 6th Revised Sheet No. 18
5th Revised Sheet No. 13, Canceling 4th Revised Sheet No. 18
4th Revised Sheet No. 14, Canceling 3rd Revised Sheet No. 18
4th Revised Sheet No. 15, Canceling 3rd Revised Sheet No. 18
4th Revised Sheet No. 16, Canceling 3rd Revised Sheet No. 18
4th Revised Sheet No. 17, Canceling 3rd Revised Sheet No. 18
1st Revised Sheet No. 17a, Canceling Original Sheet No. 18

2. That the tariff sheets previously filed by The Empire District Electric Company and approved by the Commission both in its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs, to be effective December 14, 2007, shall remain in effect; provided, however, that, as clarified in the Order of Clarification issued on January 15, 2008, tariff sheets which took effect on or after January 2, 2007, shall not be affected or otherwise displaced by this order.

3. That, as stated in the Report and Order issued December 21, 2006, the Nonunanimous Stipulation and Agreement Regarding Rate Design, filed on September 13, 2006, and deemed to be unanimous by operation of Commission Rule, is hereby approved. The parties shall comply with the terms of the Stipulation and Agreement.

4. That all motions filed herein on or prior to December 28, 2006, currently pending and not otherwise specifically addressed herein, are hereby denied.

5. That the Application for Rehearing filed by Explorer Pipeline and Praxair, Inc. with regard to the December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and the Applications for Rehearing filed herein by The Empire District Electric Company, the Office of the Public Counsel, and Explorer Pipeline and Praxair, Inc., with regard to the Commission's December 21, 2006 Report and Order are determined to be moot.

6. That the Applications for Rehearing filed herein by The Empire District Electric Company, the Office of the Public Counsel, and Explorer Pipeline and Praxair, Inc., with regard to the Commission's January 9, 2007 Order Supplementing and Clarifying Report and Order are determined to be moot.

7. That any applications for rehearing and/or clarification filed herein with regard to the Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs, issued on December 4, 2007, to be effective December 14, 2007, shall remain pending before this Commission.

8. All other pending rehearing applications not specifically addressed herein shall also remain pending before this Commission.

9. That this Report and Order Upon Reconsideration shall become effective on April 5, 2008.

Davis, Chm., Murray, Appling,
and Jarrett, CC., concur;
Clayton, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 26th day of March, 2008.

In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the TRRO.

Case No. TO-2006-0360
Decided March 31, 2008

Telecommunications §1. The Commission concluded, based on the FCC's intent of its "business-line" definition in the *TRRO*, that the business line count should include UNE-L lines used to serve residential customers, and that the business line count for digital UNE-L should be based on the loop's capacity and not the loop's usage.

Telecommunications §1. The Commission concluded that a collo-to-collo arrangement does not satisfy the *TRRO* definition of a fiber-based collocator.

APPEARANCES
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REGULATORY LAW JUDGE: Kennard L. Jones, Judge

REPORT AND ORDER

Background

In determining whether certain unbundled network elements will be made available by incumbent local exchange companies (ILECs) to competitive local exchange companies (CLECs), the

Telecommunications Act requires the Federal Communications Commission to consider whether an ILEC's failure to provide such access to a CLEC would impair the CLEC's ability to provide the services it seeks to offer.[1] In 2005, the FCC released its Triennial Review Remand Order (*TRRO*)[2] exercising its duties under the Act. The *TRRO* is an attempt by the FCC to label certain wire centers as non-impaired; meaning, that there are sufficient opportunities in a wire center such that a CLEC's ability to do business through that wire center is not impaired without access to the ILEC's UNEs. In trying to make this determination, the FCC looks to the number of business lines and fiber-based collocators as indicators of the amount of activity in the wire center. The more activity, the more opportunity there is for the CLEC to do business. If there is insufficient activity, then the wire center is impaired and the ILEC must provide unbundled network elements.

AT&T Missouri responded to the FCC's *TRRO* by interpreting the FCC rules and the *TRRO* and, through that interpretation, listing wire centers that are not impaired. In doing so, AT&T applied the definitions of "business line" and "fiber-based collocator." NuVox Communications of Missouri, Inc. and other CLECs that have intervened in this matter, disagree with AT&T's interpretation of these definitions and the resulting characterization of certain wire centers as non-impaired.[3] The parties seek the Missouri Public Service Commission's guidance in this regard and have presented a number of issues for the Commission to resolve.

"Business-Line" Definition Issues

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, <u>plus the sum of all UNE loops connected to that wire center</u>, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

[1] 47 U.S.C Section 251(d).
[2] *In the Matter of Unbundled Access to network Elements,* WC Docket No. 04-313 and *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338. (*TRRO*).
[3] The identification of these wire center**s** is highly confidential.

> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services.
> (2) Shall not include non-switched special access lines.
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." [4]

The first business line issue is: **Should the business line count include all UNE-L lines or only UNE-L lines used to provide switched service to business end users?**

Both the Staff of the Commission and AT&T argue that the definition of business line includes UNE-L lines used to serve residential customers. This conclusion is premised on the fact that the clause "plus the sum of all UNE loops connected to that wire center", underlined above, is not modified by the word "business." They argue that the absence of the word "business" shows that the FCC's intent was to include residential UNE-loops connected to a wire center.

As further evidence of the FCC's intent, AT&T points out that in the *TRRO* the FCC states in part at paragraph 105:

> The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs.

Staff and AT&T point out that although "UNE-P" is modified by the word "business" "UNE-loops" is not, arguing therefore that the FCC intended to include residential and business "UNE-loops" in the definition of "business line."

Staff and AT&T also emphasize the FCC's intent that the data relied on be objective and readily available to ILECs.[5] In this regard, AT&T reports to the FCC the total number of UNE loops but does not separately identify and report the number of UNE loops used to serve

[4] 47 C.F.R. §51.5.
[5] *TRRO,* pars. 93 and 161.

business customers. Further, AT&T does not have information on whether the CLECs use UNE loops for business or residential customers.[6]

The CLECs argue that the definition of business line does not include UNE-loops used to serve residential customers. Pointing to the first clause in the definition, the CLECs note that the definition of a business line is one that "is an incumbent LEC-owned switched access line used to serve a business customer." The CLECs argue that the rest of the definition builds on this clause and that if the FCC intended UNE-loops serving residential customers to be included in the definition of "business line" it would not have, in the first sentence, restricted business lines to those used to serve a business customer.

Findings of Fact

This issue requires no findings of fact. It requires only the Commission's interpretation of the law and of the FCC's intent as expressed through the *TRRO.*

Conclusion of Law

Between the two arguments presented on this issue, the Commission is most persuaded by that of Staff and AT&T. In both the definition of "business line" and in the FCC's *TRRO,* the phrase "UNE-loop" is not modified by the word "business." This is true, despite that "switched access lines", in the definition, is modified by the word "business", as is "UNE-P, in the *TRRO* paragraph. It is therefore the FCC's intent that UNE-loops serving both business and residential customers be included when counting "business lines."

Also weighing in AT&T's favor is the FCC's intent that the information on business line***s*** be objective and readily available. AT&T knows the capacity of the lines sold to CLECs. If it is something other than voice grade, then AT&T might assume the line is serving a business. However, as discussed during the hearing, a voice grade line might also serve a business.[7] It follows that the distinction between a business loop and one that serves a residential customer will blur at times. As pointed out by AT&T, it was the FCC's intention that an approach be adopted that "relies on objective criteria to which the incumbent LECs have full access, is readily available by competitors . . . ."[8] Further, the FCC discourages the "loop-by-loop"

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[6] Chapman Direct, page 26, lines 1-5.
[7] Tr. page 192, line 9 through page 193, line 13.
[8] *TRRO* par. 108.

evaluations that would be necessary to determine whether a loop serves a business or residential customer.[9]

Finally, as pointed out by AT&T, if the language in the definition is unambiguous then the Commission must interpret it in is plain and ordinary meaning.[10] The disputed language specifically states that "all UNE-loops" be included in the count of business lines. In light of the above, the Commission concludes that UNE-loops serving residential customers are included in the business line count.

The second issue under the business line definition is: **should the business line count for digital UNE-L be based on the loop's capacity or on the loop's usage?**

The following portion of the FCC definition of a "business line" governs this issue:

> Among these requirements, business line tallies:
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'[11]

Generally, Staff and AT&T argue that the last sentence in this section of the definition means that a DS1 line equals 24 business lines. Their position is premised on the same arguments above; that the FCC intended that the business-line count be objective and readily available and that the plain language of the rule dictates that a digital line be counted according to its capacity. On the other hand, the CLECs argue that this sentence is not an absolute instruction that a DS1 line be counted as 24 business lines but rather that a DS1 line contains, for example, 24 64 kbps lines. They posit that all circuits on the DS1 line must be connected to an end-user business customer and provide switched services to count as 24 business lines. The CLECs emphasize that if all other requirements in the definition are met, then only those lines that are actually being used will be counted.

The CLECs go on to argue that AT&T's position ignores whether the lines are being used to provide switched business service to end users. This, the CLECs premise, is out of step with reality. Pointing

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[9] *TRRO* par. 159.
[10] *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989).
[11] *See* Footnote 4.

to this Commission's findings,[12] the CLECs note that of the 24 available lines on a DS1 facility, approximately 11 are typically used to provide the switched voice service. Hence, the CLECs argue the FCC intends that these 11 lines be counted under the business line rule because this better reflects real-world usage.

The CLECs go on to point out that the Public Utility Commission of Oregon concluded that unused capacity should not be included in the definition of business lines because the phrase "used to serve," in the first sentence of the business line definition, precludes that result.[13] Further, the North Carolina Public Utility Commission[14] and an Arbitrator in Oklahoma[15] also reached this conclusion.

Discussion

AT&T and Staff emphasize that it is the FCC's intent that data gathered for purposes of counting business lines be objective and readily available. When AT&T leases a digital line to a CLEC, AT&T has no idea whether or in what manner those lines are being used. Therefore, to count the actual lines used would require AT&T to verify information provided by the CLECs. The FCC notes that CLECs have little incentive to provide this information to regulators when evaluating impairment.[16]

The CLEC's argument of using the average of 11 lines used per digital loop, as found in the previous Commission docket,[17] is unreasonable in that it still does not reflect the actual lines used. This issue does not contemplate using an estimate of the number of lines used in a digital loop but rather the actual number of lines or the capacity of the loop.

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[12] Commission Case No. TO-2004-0207, Order Establishing Geographic Markets and Enterprise Market Cutoff (Feb 24, 2004).

[13] Oregon Public Utility Commission, Docket UM 1251, *In the Matter of Covad Communications Company; Eschelon Telecom of Oregon, Inc.; McLeodUSA Telecommunications Services, Inc.; and XO Communications Services, Inc. request for Commission Approval of Non-Impairment Wire Center List* (March 20, 2007).

[14] North Carolina Public Utilities Commission, Docket No. P-55, Sub 1549, *Proceeding To Consider Amendments To Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law* (March 1, 2006).

[15] Oklahoma Corporation Commission, Cause No. PUD 200600034, *Complaint of Southwestern Bell Telephone, L.P. d/b/a AT&T Oklahoma Against NuVox Communications of Oklahoma, Inc., Regarding Wire Center UNE Declassification* (May 15, 2006)

[16] *TRRO,* par. 158.

[17] *See footnote 11.*

Findings of Fact

This issue requires no findings of fact. It requires only the Commission's interpretation of the law and of the FCC's intent as expressed through the *TRRO.*

Conclusion of law

The Commission concludes that the business line count for digital UNE-L shall be based on the loop's capacity rather than the actual usage. Although the Commission recognizes that the first sentence in the definition of "business line" contains the phrase "used to serve", a count of each used line in the loop is not practicable and it is not the FCC's intention that such a count be made.[18]

The final issue under business line counts is: **On what vintage should the business line counts supporting the wire center designations rely?**

ARMIS 43-08 refers to periodic reports ILECs file with the FCC. In April 2004 AT&T filed this report, which reflected data as of December 31, 2003. Based on the reports filed by ILECs, the FCC formulated its wire center impairment criteria.

Both AT&T and Staff suggest that the data from December 2003, reflected in the April 2004 report to the FCC, should be the vintage. Both point out that this was the most recent data available upon the effective date of the *TRRO,* which was March 11, 2005. The CLECs also agree that the December 2003 data should be used. However, the CLECs contend that AT&T's application of the business line definition substantially increases the business line count over what the FCC had in mind when it relied on the data.

Discussion

All parties agree that the December 2003 ARMIS 43-08 data should be used. The CLEC's opposition is premised on the arguments presented under the "business line" definition. In other words, the CLECs argue that if the Commission agrees with the CLECs with regard to the business line definitions, then the December 2003 data should be used. However, if the Commission agrees with AT&T and Staff on the business line definition issues, then the CLECs argue that data from 2004 should be used. AT&T argues that the December 2004 data was made available to the FCC in April 2005, after the effective date of the

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[18] *TRRO* par. 157-159.

TRRO. AT&T therefore reasons that it is unreasonable to rely on data that was not before the FCC when issuing the *TRRO*.

Although it may be true that settling on the ARMIS 2003 data and ruling in favor of AT&T and the business-line issues will result in more wire centers being unimpaired, the analysis of these two issues is independent. This Commission will not premise its legal analysis of the business-line definition on what vintage of data is used. Nor will the Commission make a finding on the issue of vintage in light of the conclusions made under the business-line issue.

Finding of Fact

Based on the above discussions, the Commission finds that the December 2003 ARMIS 43-08 data shall be the vintage upon which the business line counts supporting the wire center designations rely.

Conclusion of Law

There is no law upon which the issue rests. Hence, this issue does not require the Commission to make any conclusion of law.

Fiber-based Collocator Issues

The first issue under the Fiber-based Collocator issues is: **Does the definition of fiber-based collocator include collo-to-collo arrangements in which the connecting carrier establishes service without providing optronics for fiber that leaves the wire center?**

Background

The FCC defines fiber-based collocators as follows:

> Any carrier, unaffiliated with the ILEC, that maintains a collocation arrangement in an ILEC wire center, with active electric power supply, and operates a fiber-optic cable or comparable transmission facility that
> (1) Terminates at a collocation arrangement within the wire center;
> (2) Leaves the ILEC wire center premises; and
> (3) Is owned by a party other than the ILEC or any affiliate of the ILEC, except as set forth in this paragraph. Dark fiber obtained from an ILEC on an indefeasible right of use basis shall be treated as non-ILEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliated is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.[19]

[19] 47 C.F.R. §51.5.

Both parties agree that a "collo-to-collo" arrangement is one where a carrier connects to a second carrier collocating with, or leasing space from, the ILEC. The parties, however, do not agree that the arrangement where a second carrier, connecting to the carrier collocated with the ILEC, constitutes a fiber-based collocation. More specifically, the parties do not agree on what it means to "operate" a system or what constitutes a "comparable transmission facility."

AT&T argues that a carrier may operate a system as a carrier collocating with another by sending transmission through that other carrier's fiber optic terminal over a fiber cable that goes out of the wire center.[20] AT&T also argues that the "collo-to-collo" arrangement might be considered a "comparable transmission facility" if the effect of the connection from the second carrier to the carrier collocating with the ILEC allows the second carrier to send out traffic that is the technical equivalent of fiber-optic cable.

The CLECs emphasize the importance that each fiber-based collocator represents a distinct transport facility terminating in and leaving the wire center. The CLECs further argue that fiber-optics networks "terminate" where fiber strands terminate into optronic equipment that determines system capacity. [21]

Discussion

The definition of a fiber-based collocator shows that the phrase "comparable transmission facility" is an alternative to fiber-optic cable terminating in, and leaving, the wire center. Any comparable facility must then also terminate in, and leave, the wire center.

A collo-to-collo arrangement does not satisfy this requirement. The carrier connecting to the collocated carrier has a facility that begins and terminates within the wire center.[22] AT&T argues that the facility does not actually terminate within the wire center but leaves the wire center over the collocated carrier's facility; thus, satisfying the definition. The Commission does not agree with this rationale. Hence, under AT&T's position, the second listed requirement in the definition is not satisfied; that the fiber-optic cable or comparable transmission facility leave the wire center. The FCC, in its *TRRO,* indicates that the focus of determining an arrangement in a fiber-based collocation is whether the transmission facility both terminates in and

[20] Nevels Direct, page 10, lines 218-222.
[21] Gillan Direct, page 23, lines 4-5, lines 18-19 and 21-22.
[22] Nevels Rebuttal, Attachment MN-1.

leaves the wire center.[23] The collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center.

Findings of Fact

This issue presents only a legal question. There need be no factual findings in order to resolve this issue.

Conclusion of Law

The Commission concludes that a collo-to-collo arrangement does not satisfy the definition of a fiber-based collocator.

The second issue under the fiber-based-collocation issues is: **How should the term, "comparable transmission facility," be defined?**

The term "comparable transmission facility" appears in the above definition of a fiber-based collocator. Staff argues that the Commission need not define this term. Rather, that it should be undertaken on a case-by-case basis.[24] AT&T's witness testified that AT&T has "identified no carriers that are collo-to-collo cross connected that would affect the counts that we've provided today to this Commission."[25] The witness went on to state that there may be more collo-to-collo connections and that the Commission should address this issue now so that the companies understand what the Commission's interpretation will be on a going-forward basis. During a discussion of whether NuVox should be counted as a fiber-based collocator in a wire center, the CLEC's witness stated that it is necessary, on a going-forward basis for people to understand how classifications will be interpreted by this Commission.[26]

Discussion

The wire center classifications, as they are determined in this order, will remain as such. Given the permanency of the classifications, the Commission concludes that it is unnecessary for it to define the term "comparable transmission facility" until that question is put squarely before it with a real, rather than hypothetical, conflict to resolve. However, consistent with the discussion under the issue of collo-to-collo connections not meeting the definition of a fiber-based collocator, the Commission emphasizes that a comparable transmission facility must terminate in, and leave the wire center.

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[23] *TRRO,* par. 102.
[24] Staff prehearing brief, page 4.
[25] Tr. page 170, lines 2-7.
[26] Tr. page 223, line 4 – page 224 line 6.

The final issue under “fiber-based collocator” issues is: **Should NuVox be counted as a fiber-based collocator in the locations specified by AT&T Missouri?**

Attached to the direct testimony Staff’s witness Michael Scheperle, is an affidavit of Edward Cadieux, Senior Regulatory Counsel for NuVox. In this document, Mr. Cadieux describes NuVox’s collo-to-collo arrangement in three AT&T wire centers.[27] These are the wire centers specified by AT&T. In all three instances, Mr. Cadieux indicates that none of the facilities owned by NuVox leaves the wire center.

In its post-hearing brief, AT&T makes the same arguments it made under the issue of whether a collo-to-collo arrangement should count as a fiber-based collocator. Specifically, AT&T states that, “NuVox’s own description of its collocation~~s~~ arrangement in [one] wire center makes it a prototypical arrangement (not merely a ‘comparable transmission facility’) for purposes of FCC Rule 51.5.” AT&T goes on to state that NuVox operates fiber-optic cable that terminates in and leaves the wire center.[28] This is inconsistent with Cadieux’s statement. As discussed above, the Commission concludes that a transmission facility must terminate in and leave the wire center.

Finding of Fact

NuVox’s arrangements do not satisfy the requirement that a transmission facility both terminate in and leave the wire center. NuVox is therefore not a fiber-based collocator in those wire centers.

Conclusion of Law

Consistent with the Commission’s above conclusions, NuVox’s arrangements are that of collo-to-collo facilities. The Commission has previously concluded that collo-to-collo arrangements are not included in the definition of fiber-based collocator. The Commission again concludes that because NuVox’s arrangements are collo-to-collo arrangements NuVox shall not be counted as a fiber-based collocator.

[27] The identification of these wire centers is highly confidential.
[28] AT&T post-hearing brief, page 21.

Remaining Issues

Issue: In March of 2005, did AT&T correctly identify 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities?

Tier 1 wire centers are those ILEC wire centers that contain at least four fiber-based, at least 38,000 business lines, or both.[29] Attached to the direct testimony of AT&T's witness, Carol Chapman, is a list of 14 wire centers dated March 11, 2005. All of the wire centers are designated as Tier 1 wire centers. The Commission notes that in a particular wire center,[30] NuVox is listed as a fiber-based collocator. Also, in that center AT&T denotes 24,000 or more business lines. Having less than 38,000 business lines, it appears that AT&T has included this wire center on its list because the center has 4 or more fiber-based collocators.

Above, the Commission found that NuVox arrangements in several wire centers should not be counted as a fiber-based collocation. In two of those wire centers there are sufficient fiber-based collocators, without including NuVox, to be listed as a Tier 1 wire center. In one, however, without including NuVox, the wire center will have less than 38,000 business lines and only three fiber-based collocators. In this case, the wire center should not be included as a Tier 1 wire center.

Finding of Fact

The Commission therefore finds that AT&T did not correctly identify 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities.

Conclusion of law

In order to resolve this issue the Commission must necessarily conclude, as it has done in previous issues, that collo-to-collo arrangements are not included in the definition of a fiber-based collocator and that one of the 14 wire centers was incorrectly identified as non-impaired.

[29] 47 C.F.R. §51.319(e)(3)(i).
[30] The identification of the wire center is highly confidential.

Issue: As a result of a commitment arising from the merger of SBC and AT&T, has AT&T correctly identified five wire centers as non-impaired under the Tier 2 wire center criteria for dedicated interoffice transport facilities?

The Commission concludes that because this issue involves interpretation of a merger agreement approved by the FCC, the parties should seek interpretation of the agreement from the FCC.

Issue: Did AT&T, in March of 2005, correctly identify three wire centers as non-impaired for DS3 capacity loops.

The standard for non-impairment for DS3 capacity loops is that the wire center has at least 38,000 business lines *and* at least four fiber-based collocators. This is different than the impairment criteria for Tier 1 wire centers in that both the business line and fiber-based-collocator count must be satisfied. Under the Tier 1 criteria only one or the other must be met.

The CLECs argue in their prehearing brief that AT&T did not correctly identify one wire center because the wire center does not have over 38,000 business lines. The Commission has concluded above that AT&T and Staff's interpretation of the business line definition is correct. The CLECs' argument therefore fails under this issue.

Finding of Fact

The Commission finds that AT&T has correctly identified, in March of 2005, three wire centers as non-impaired for DS3 capacity loops.

Conclusion of Law

The Commission has concluded above, and here concludes, that UNE-loops serving residential customers is included in the definition of a business line.

Issue: Should the Commission approve a separate wire center list applicable to the period between March 2005 and December 2005?

The CLECs argue that the merger agreement precludes a separate list. Staff points out that the list was updated as a result of the merger. Whether the merger agreement requires the list to be applied retroactively necessitates interpretation of the merger agreement approved by the FCC. As previously noted by the Commission, the parties may seek interpretation of the merger agreement from the FCC.

Having made the above conclusions and findings of fact, the Commission issues the following order.

IT IS ORDERED THAT:

1. Unbundled network elements shall be made available to competitive local exchange carriers as is consistent with the Commission's conclusions and findings in this Report and Order.
2. This order shall become effective on April 10, 2008.
3. This case may be closed on April 11, 2008.

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur;
Clayton, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

***NOTE:** Another order in this case can be found at page 318.

In the Matter of the Application of Laclede Gas Company for an Accounting Authority Order Authorizing the Company to Defer for Future Recovery the Costs of Complying with the Permanent Amendment to the Commission's Cold Weather Rule*

Case No. GU-2007-0138
Decided April 17, 2008

Gas §34. The Commission concluded that the difference between the smaller upfront arrearage payment required under the amendment and the payment that could have been collected under the previous rule can be considered incremental costs and therefore can be included in the AAO, for calculating costs of complying with the permanent amendment to the cold weather rule. However, because including those costs could allow Laclede to recover those costs twice, the Commission directed Laclede to continue to track payments and additional arrearages of its affected customers.

Expense §11. The Commission concluded that the difference between the smaller upfront arrearage payment required under the amendment and the payment that could have been collected under the previous rule can be considered incremental costs and therefore can be included in the AAO, for calculating costs of complying with the permanent amendment to the cold weather rule. However, because including those costs could allow Laclede to recover those costs twice, the Commission directed Laclede to continue to track payments and additional arrearages of its affected customers.

*The case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 301 S.W. 3d 556, (Mo App. W.D. 2009).

Appearances

Jennifer Heintz and Lera Shemwell, Legal Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Marc D. Poston, Senior Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102

Michael C. Pendergast, Vice President and Associate General Counsel and **Rick Zucker**, Assistant General Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101, for Laclede Gas Company.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: The Commission determines that Laclede Gas Company's cost of compliance with the permanent amendment to the cold weather rule is $2,494,311, and directs Laclede to include that amount in the Accounting Authority Order previously established in this case.

Pending Motion

On April 10, 2008, after the Commission initially discussed this case at an agenda meeting, the Office of the Public Counsel filed a motion suggesting that the Commission waive the provision of its regulation that requires it to issue a decision in this case by no later than April 28. On April 11, the other parties to this case, Laclede and the Commission's Staff, filed pleadings opposing Public Counsel's motion. Given the opposition of the other parties, the Commission will deny Public Counsel's motion for waiver.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate the Commission has failed to

consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

The roots of this dispute run back to the fall of 2005. At that time, the Commission was concerned that natural gas prices were high and as a result, many customers would be unable to pay for natural gas during the upcoming winter season. To deal with that problem, the Commission promulgated an emergency rule, effective January 1, 2006, that made it easier for utility customers who owed past-due bills for service to qualify for a repayment plan that would allow them to receive service during the cold weather season. Subsequently, the Commission made portions of the emergency amendment a "permanent" part of the cold weather rule through the administrative rulemaking process.[1]

The cold weather rule, 4 CSR 240.13.055, allows an affected utility to defer and recover the costs of complying with the amendment to the rule through an accounting authority order (AAO) effective until September 30, of each year for the preceding winter.[2] On September 29, 2006, as it is allowed to do by the terms of the cold weather rule, Laclede Gas Company applied for an AAO to recover its costs of compliance with the permanent amendment to the cold weather rule for the 2006-2007 cold weather season. The Commission granted the requested AAO on December 7, 2006.

Thereafter, on October 31, 2007, Laclede filed a request for determination of its cost of compliance with the permanent amendment to the cold weather rule. Again, this request is consistent with the procedural requirements of the rule.[3] At that time, Laclede asserted that its cost of compliance, measured as of September 30, 2007, was $2,667,870.

Laclede's request for determination of its cost of compliance explains that the Commission determined its cost of compliance with the emergency amendment for the period of January through March, 2006, as part of Laclede's rate case proceeding.[4] Laclede asked the Commission to similarly defer making a determination on its current request until that request could be evaluated as part of its next rate case.

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[1] 31 Mo Reg. 18, Page 1436 (September 15, 2006). The parties refer to this amendment as the permanent amendment to distinguish it from the earlier emergency amendment. This report and order will also refer to it as the permanent amendment for that reason.

[2] 4 CSR 240-13.055(14)(G)1.

[3] 4 CSR 240-13.055(14)(G)2.

[4] Commission Case No. GR-2007-0208.

The Commission's Staff and the Office of the Public Counsel objected to that suggestion, so the Commission directed Staff and Public Counsel to submit their positions regarding Laclede's request for determination of costs by February 28, 2008, with all supporting evidence, as provided in the regulation.[5]

On February 28, Laclede and Staff filed a nonunanimous stipulation and agreement by which they agreed Laclede should be allowed to defer and recover compliance costs of $2,494,311, plus additional interest, in its next rate case. They also agreed that Laclede should amortize that amount in rates over up to a five-year period beginning with the effective date of the new rates established in Laclede's next rate case.

On the same date, Public Counsel filed its own statement of position regarding Laclede's request for determination of costs, urging the Commission to substantially reduce the amount of costs claimed by Laclede. On March 5, Public Counsel formally objected to the nonunanimous stipulation and agreement filed by Laclede and Staff.

Because of the lack of agreement between the parties, the Commission conducted an evidentiary hearing on March 31. The parties filed post-hearing briefs on April 7.

The Effect of the Permanent Amendment to the Cold Weather Rule

The purpose of the cold weather rule is to protect the health, safety, and comfort of natural gas customers by preventing the utility from shutting off gas service for nonpayment between November 1 and March 31, on a day when the outside temperature is predicted to drop below 32 degrees. Because of notice and scheduling requirements written into the rule, a utility usually cannot disconnect a customer for nonpayment during the winter months.[6] That means a customer receiving gas service at the start of the cold weather season will likely be able to retain that service until spring. For that reason, customers who owe a past-due balance from the previous winter, whose service may even have been shut off during the summer for non-payment, will make a strong effort to be reconnected before cold weather sets in. Governmental and social service agencies are also active at that time in giving grants to at-risk customers to try to get them reconnected to service before the winter. Understandably, that time is when a utility,

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[5] 4 CSR 240-13.055(14)(G)2.
[6] Transcript, Page 54, Lines 10-19.

such as Laclede, has the most leverage to obtain past-due payment from its customers.[7]

The cold weather rule as it existed before the permanent amendment, allowed a customer to be reconnected for the winter if he or she paid 80 percent of his or her past-due balance and entered into a payment plan to pay-off the remaining balance. The permanent amendment reduced the initial payment requirement to 50 percent of the past-due balance, or five hundred dollars, which ever was less. More customers were able to qualify for reconnection under this standard, in part because the fixed amount of money available to governmental and social service agencies for grants to low-income customers could be spread to more customers to allow more customers to be reconnected.

Since customers who reconnect for a partial payment under the cold weather rule have failed to pay their gas bills in the past, they are more likely to be unable to pay their future bills as well. Consequently, having more customers reconnected under the cold weather rule results in more uncollected payments for the utility. In recognition of that fact, the permanent amendment established a method by which the gas utilities would be allowed to defer and recover their incremental costs of complying with the permanent amendment in a future rate case.

The Determination of Laclede's Cost of Compliance

Laclede and Staff included the following amounts in their determination of Laclede's cost of compliance:

1) $930,221 in additional unpaid arrearages incurred by customers after taking advantage of the new rule provisions;
2) $1,529,432 as the difference between the smaller upfront arrearage payment required under the amendment ($500 or 50%) and the payment that could have been collected under the previous rule (80%);
3) $34,658 in interest accumulated from June 30, 2007 to September 30, 2007.
4) $0.00 for increased administrative costs.[8]

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[7] Transcript, Pages 66-67, Lines 24-25, 1-12.

[8] Fallert Direct, Ex. 1, Schedule 1, Paragraph 17. Laclede's initial request sought $64,640 for additional administrative costs, but Laclede dropped its claim for those costs as part of the agreement with Staff.

Laclede's numbers were calculated by examining the customer account of each of the 8,440 customers who were reconnected under the provisions of the cold weather rule during the winter of 2006-2007.

All the customers who reconnected under the cold weather rule had an unpaid beginning balance, ranging from a few hundred dollars to a few thousand dollars. Under the old rule, Laclede would reconnect a customer who had previously defaulted under a cold weather payment plan only if the customer paid 80 percent of that beginning balance. The permanent amendment to the cold weather rule reduced that payment requirement to 50 percent or $500, which ever was less.[9] So, a customer who owed an unpaid balance of $1,000 would have had to pay $800 to reconnect under the old cold weather rule. Under the amendment, that customer would have to pay only $500 to be reconnected. Laclede and Staff would allow Laclede to include the $300 difference between $800 and $500 as a cost of compliance with the amendment, assuming the customer did not subsequently pay that difference.[10]

After customers were reconnected under the cold weather rule, many incurred additional unpaid balances. For example, the previously described hypothetical customer who had an initial unpaid balance of $1,000, paid $500 to be reconnected, leaving a $500 balance at the time he or she was reconnected under the cold weather rule. Over the next winter, including any payments made during the following summer, the customer might have accumulated an unpaid balance of $1,100, measured as of September 30, 2007. The $600 increase in the unpaid balance would be included as a cost of compliance in Laclede and Staff's calculation.

Laclede examined each of the 8,440 affected customer accounts and totaled the previously described costs of compliance for those accounts. Laclede then reduced the total cost by approximately 60 percent in recognition of the fact that some bad debt expense, including costs associated with the cold weather rule, are already built into Laclede's rates through its last rate case.[11] By making that adjustment, Laclede intended to ensure that it was seeking deferral of only incremental costs in its AAO. The exact amount of that adjustment is, however, an estimate, not a customer specific calculation.[12]

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[9] 4 CSR 240-13.055(14)(A).
[10] Transcript, Page 51, Lines 19-25.
[11] Transcript, Page 53, Lines 3-7 and Page 49, Lines 14-18.
[12] Transcript, Page 71, Lines 8-14.

Public Counsel is willing to include the $930,221 in additional unpaid arrearages and the accumulated interest when determining Laclede's cost of compliance for inclusion in the AAO.[13] However, it objects to including $1,529,432 as the difference between the upfront payments that could be collected under the new and old rule.

Public Counsel contends those costs should not be included in the calculation of Laclede's cost of compliance because they would not be an incremental cost of compliance with the rule. In other words, Laclede had already incurred those bad debts before the customer was reconnected under the loosened requirements of the emergency amendment. As a result, Laclede's inability to collect those debts should not be included as a cost of complying with the emergency amendment.

Furthermore, Public Counsel contends that allowing Laclede to include those costs for recovery through its AAO could allow Laclede to recover those costs twice, if the customer subsequently pays-off all or a portion of that debt.

Prior Calculation of the Cost of Compliance with the Emergency Amendment

This is the first time the Commission has been asked to determine Laclede's cost of compliance with the permanent amendment to the cold weather rule. It is not, however, the first time the Commission has had to determine Laclede's cost of compliance. The permanent amendment did not go into effect until the fall of 2006, but a similar emergency amendment to the cold weather rule was in effect for January through March of 2006. The Commission granted Laclede an AAO to allow it to defer and recover the cost of complying with the emergency rule. The Commission made its determination of the cost of compliance with the emergency rule in conjunction with the overall settlement of Laclede's subsequent rate case.

The parties to the stipulation and agreement that resolved the rate case agreed to a specified dollar amount in uncollectible expense and interest costs relating to compliance with the emergency cold weather amendment, and further agreed that those costs would be amortized and recovered in rates over a five-year period.[14] The rate case settlement did not describe the method by which the agreed upon dollar amount was derived, and the stipulation and agreement

[13] Transcript, Page 137, Lines 6-21.
[14] Fallert Direct, Ex. 1, Schedule 7, Unanimous Stipulation and Agreement, Paragraph 16, *In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules*, Case No. GR-2007-0208.

specifically states that none of its signatories shall be deemed to have approved or acquiesced in any ratemaking principal, including any method of cost determination.[15] However, the agreed upon dollar amount is the amount recommended in the prefiled testimony of Public Counsel's witness in that case, Ted Robertson.[16] That fact is significant because Laclede and Staff calculated their determination of costs in this case using the method used by Robertson in the rate case.[17] Laclede and Staff contend that if the method used by Public Counsel to determine Laclede's costs was acceptable in the rate case, it should also be acceptable in this case.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1.Laclede Gas Company is a "Gas Corporation" and "Public Utility," as those terms are defined at Subsections 386.020 (18) and (42), RSMo Supp. 2007. As such, it is subject to regulation by this Commission.

2.Commission Rule 4 CSR 240-13.055(5)(A) and (B) provide that a gas utility may not disconnect gas service to a customer who relies on gas for heat on any day when the National Weather Service forecast for the following day predicts that the temperature will drop below 32 degrees, or on any day when utility personnel will not be available to reconnect service on the immediately succeeding days and the forecast for those days are for temperatures dropping below 32 degrees.

3.Commission Rule 4 CSR 240-13.055(3) requires a utility seeking to discontinue service for nonpayment between November 1 through March 31 to take multiple specified steps to notify a customer of the impending disconnection beginning at least ten days before the date of the proposed disconnection.

4.Commission Rule 4 CSR 240-13.055(6) provides that a utility may not discontinue heat-related utility service for nonpayment from November 1 through March 31, if, among other things, the customer makes an initial payment and enters into a payment agreement in compliance with section (10) of the cold weather rule. Similarly, Section

[15] Unanimous Stipulation and Agreement, Paragraph 25, *In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules*, Case No. GR-2007-0208.
[16] Fallert Direct, Ex. 1, Schedule 6. *See also*, Transcript, Page 105, Lines 20-21.
[17] Fallert Direct, Ex. 1, Schedule 1, Paragraph 17.

(9) of the same rule requires the utility to reconnect previously disconnected heat-related utility service for the same reasons.

5.Commission Rule 4 CSR 240-13.055(10) establishes the criteria for acceptable payment agreements under the cold weather rule. Paragraph (10)(C)2 of that rule states that a customer who has defaulted on a payment plan under the cold weather rule must make an initial payment under their payment plan of 80 percent of the customers preexisting balance, unless the customer and the utility agree to a different amount.

6.Commission Rule 4 CSR 240-13.055(14), known as the permanent amendment to the cold weather rule, establishes a special provision, applicable only to providers of natural gas service between November 1 and March 31. Paragraph (A) of that rule provides in part as follows:

> From November 1 through March 31, not withstanding paragraph (10)(C)2 of this rule to the contrary, a gas utility shall restore service upon initial payment of the lesser of fifty percent (50%) or five hundred dollars ($500) of the preexisting arrears, with the deferred balance to be paid as provided in subsection (10(B). … Between November 1 and March 31, any customer threatened with disconnection may retain service by entering into a payment plan as described in this section. …

7.Commission Rule 4 CSR 240-13.055(14)(F) allows a gas utility to recover its costs of complying with the permanent amendment. That subsection states as follows:

> A gas utility shall be permitted to recover the costs of complying with this section as follows:
>
> 1.The cost of compliance with this section shall include any reasonable costs incurred to comply with the requirements of this section;
>
> 2.No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section, provided that the costs calculated in accordance with paragraph 14(F)1. shall be considered costs of complying with this section;
>
> 3.Any net cost resulting from this section as of June 30 each year shall accumulate interest at the utility's annual short-term borrowing rate until such time as it is recovered in rates; and

> 4.No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section, provided that a gas utility may continue to calculate and defer for recovery through a separate Accounting Authority Order the costs of complying with the commission's January 1, 2006 emergency amendment to this rule upon the same terms as set forth herein. The costs eligible for recovery shall be the unpaid charges for new service received by the customer subsequent to the time the customer is retained or reconnected by virtue of this section plus the unpaid portion of the difference between the initial payment paid under this section and the initial payment that could have been required from the customer under the previously enacted payment provisions of section (10) of this rule, as measured at the time of subsequent disconnection for nonpayment or expiration of the customer's payment plan.

8.Commission Rule 4 CSR 240-13.055(G) establishes the procedure by which a gas utility is to be allowed to defer and recover the costs specified in the previous section. That section states as follows:

> A gas utility shall be permitted to defer and recover the costs of complying with this rule through a one (1)-term Accounting Authority Order until such time as the compliance costs are included in rates as part of the next general rate proceeding or for a period of two (2) years following the effective date of this amendment;
>
> 1.The commission shall grant an Accounting Authority Order, as defined below, upon application of a gas utility, and the gas utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section. Any such Accounting Authority Order shall be effective until September 30, of each year for the preceding winter;
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> 2.Between September 30 and October 31 each year, if a utility intends to seek recovery of any of the cost of compliance with this section, the utility shall file a request for determination of the cost of compliance with this section for the preceding winter season. The request by the utility shall include all supporting information. All parties to this filing will have no longer than one hundred twenty (120) days from the date of such a filing to submit to the commission their position regarding the company's

> request with all supporting evidence. The commission shall hold a proceeding where the utility shall present all of its evidence concerning the cost of compliance and other parties, including commission staff, shall present any evidence that the costs asserted by the utility should be disallowed in whole or part. Such a proceeding may be waived by the unanimous request of the parties or by a nonunanimous request without objection. The commission shall establish the amount of costs it determines have been reasonably incurred in complying with this section within one hundred eighty (180) days of the utility's request and such amount will be carried forward into the utility's next rate case without reduction or alteration. Such costs shall be amortized in rates over a period of no greater than five (5) years and shall be recovered in a manner that does not impair the utility's ability to recover other costs of providing utility service. If the commission fails to establish the amount of costs within one hundred eighty (180) days, then the amount requested by the utility shall be deemed reasonably incurred;
>
> 3.The commission has adopted the Uniform System of Accounts in 4 CSR 240-4.040. Accounting Authority Orders are commission orders that allow a utility to defer certain expenses to Account 186 under the Uniform System of Accounts for later recovery as determined by the commission in a subsequent general rate case; and
>
> 4.Although the Accounting Authority Order allows the gas utility to recover the reasonably incurred expenses only within the context of a general rate case, all such reasonably incurred expenses shall be recovered by the gas utility, together with interest thereon, as set forth above.

9.An AAO, such as the one granted to Laclede earlier in this case, allows a utility to defer certain costs for later consideration in a general rate case. The deferral of costs in an AAO does not guarantee the utility a right to ultimately recover the amounts deferred in that future rate case.[18] Rather, the Commission must consider all other relevant factors when determining in the rate case the appropriate rate the utility may charge.[19]

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[18] *Missouri Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434 (Mo. App. W.D. 1998).
[19] *Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. App. W.D. 1993).

10.Missouri's courts have held that "where language of a statute is clear, courts must give effect to the language as written."[20] The courts have also stated that "where there is a conflict between statutes enacted at the same time that address the same subject matter, the conflict should be resolved by giving effect to the more specific provision."[21] "In interpreting statutes and rules, the same principles of construction are used."[22]

11."Rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them."[23]

DECISION

Public Counsel challenges several aspects of Laclede's request for determination of its cost of compliance with the permanent amendment to the cold weather rule. The only challenge that Public Counsel actually quantifies is its contention that Laclede should not be allowed to defer the $1,529,432 it claims as the cost to it of the permanent amendment's requirement of a smaller upfront arrearage payment before a previously defaulting customer must be allowed to receive gas service.

Public Counsel contends the inclusion of these amounts would allow Laclede to defer, and ultimately recover, expenses relating to prior bad debts that were incurred before the permanent amendment to the rule went into effect and could not have been caused by the permanent amendment. Accordingly, Public Counsel argues these costs could not be incremental costs and cannot be included in the AAO.

In support of this argument, Public Counsel points to Commission Rule 4 CSR 240-13.055(14)(F)4, which states in part: "[n]o bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section". Public Counsel also points to section (14)(F)2 of that rule, which states: "[n]o gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section, … ." Furthermore, Public Counsel cites section (14)(G)1, which allows a gas utility to "book to

[20] *Kearney Special Road Dist. v. County of Clay*, 863 S.W. 2d 841, 842 (Mo. banc 1993).
[21] *Kidde America, Inc. v. Dir.of Revenue*, 242 S.W.3d 709 (Mo. banc 2008).
[22] *Morton v. Missouri Air Conservation Comm'n*, 944 S.W.2d 231, 238 (Mo. App. S.D. 1997).
[23] *Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985).

Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section."

However, Public Counsel's argument to exclude these costs from Laclede's AAO runs headlong into section (14)(F)4, which explicitly states:

> The costs eligible for recovery shall be the unpaid charges for new service received by the customer subsequent to the time the customer is retained or reconnected by virtue of this section **plus the unpaid portion of the difference between the initial payment paid under this section and the initial payment that could have been required from the customer under the previously enacted payment provisions of section (10) of this rule,** as measured at the time of subsequent disconnection for nonpayment or expiration of the customer's payment plan. (emphasis added).

That provision unambiguously allows Laclede to include the difference in initial payment required by the permanent amendment as part of its cost of compliance.

Public Counsel attempts to avoid this unambiguous result by arguing that the sections of the regulation it cites for the proposition that Laclede may defer only incremental expenses are in conflict with the section explicitly allowing deferral of the costs resulting from the differences in initial payment. Public Counsel claims this "conflict" results in an ambiguity in the regulation that the Commission should resolve by ignoring the provision that specifically allows deferral of those costs.

As indicated in the Commission's conclusions of law, a general rule of statutory or regulatory construction holds that if two statutes or regulatory provisions are in conflict, the more specific provision is to be given effect. The provisions cited by Public Counsel merely state generally that only incremental costs are to be deferred or recovered. The provision that specifies the costs eligible for recovery under the rule, explicitly states that costs resulting from differences in initial payment are eligible for recovery. If there is a conflict between the sections of the regulation cited by Public Counsel, the more specific provision must prevail.

However, there is no reason to conclude that the provisions of the regulation are even in conflict with each other. In fact, the costs resulting from the differences in initial payment requirements are incremental costs that are to be recovered under all provisions of the

rule. This is true because reducing the initial payment from 80 percent to 50 percent of the past-due balance, or $500, reduced Laclede's leverage to compel those customers to pay their past-due balances. In other words, the amendment deprived Laclede of its best opportunity to collect a larger portion of its past-due balances. The customers who took advantage of the reduced initial payment provision of the amendment are customers who had previously defaulted on a cold-weather-rule-repayment agreement from a previous year. They were unlikely to fully pay their unpaid balances, so the reduction in Laclede's ability to compel a larger initial payment had an adverse impact on Laclede's costs. The rule reasonably allows Laclede an opportunity to recover those incremental costs resulting from the amendment.

Public Counsel's witness, Russell Trippensee, testified about a difference between accrual and cash based accounting to establish what he contends is a conflict and resulting ambiguity between the different sections of the rule. According to Trippensee, Laclede generally operates under an accrual accounting system. However, the cost recovery system of section (14)(F)(4) is based on a cash accounting system, which Trippensee explains is incompatible with the accrual accounting system, creating a need to reconcile the two systems in Laclede's next rate case.

Whatever the merits of Public Counsel's accounting arguments, the need for any reconciliation is an issue properly addressed in Laclede's next rate case. Trippensee does not claim that any such reconciliation would be impossible, merely that the effort required would probably be "significant".[24] As previously indicated, any conflict between the provisions of the regulation would not justify a decision to ignore the more specific provision of the regulation.

Public Counsel raises an additional argument that is closely related to its accounting reconciliation argument. Public Counsel is concerned that establishing an amount that Laclede may recover in its next rate case based on customer balances at a particular time, in this case, September 30, 2007, would allow Laclede to possibly double recover those costs if a customer subsequently further paid down their past-due balance after the snap-shot date.

Looking at this question strictly as an accounting matter, Public Counsel's argument may be correct. However, as a practical matter, the September 30 measurement date is conservative, in that it measures a

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[24] Trippensee Direct, Ex. 4, Page 8, Lines 22-23.

customer's balance at a time of the year when it is likely to be near its lowest point. Customers who have difficulty paying their gas bills are more likely to be able to pay down their balance during the summer, when gas bills are low. Once the cold of winter arrives and gas bills start to go up, those customers are generally less likely to be able to pay off past due balances.

Public Counsel's argument also fails when examined as a legal matter. Public Counsel's concern could be valid only if it is assumed that Laclede's cost amount will be passed through into rates without further consideration in a future rate case. That is not the purpose or effect of an AAO and that is not what will happen in Laclede's next rate case. Instead, the Commission will consider the deferred amount, along with all other relevant factors, when examining Laclede's bad debt expenses, and ultimately establish a just and reasonable rate that Laclede will be allowed to charge its customers.

The Commission does, however, find that Public Counsel has legitimate concerns about possible double recovery. For that reason, the Commission will direct Laclede to continue to track payments and additional arrearages of the 8,440 affected customers after the cut-off date of September 30, 2007. Laclede shall present its findings to the Commission for consideration at Laclede's next rate case.

At the hearing, Public Counsel's witness said Public Counsel would disallow only the approximately $1.5 million Laclede was claiming as the cost resulting from differences in initial payment requirements. The witness indicated Public Counsel's agreement that the remaining $964,000 was appropriate for inclusion in an AAO.[25] However, Public Counsel's brief raises several additional arguments challenging Laclede's entire claim, including an allegation that Laclede has failed to establish its claim by clear and convincing evidence.

Specifically, Public Counsel alleges that perhaps Laclede reconnected some customers with less than the 50 percent minimum required by even the permanent amendment and should not be allowed to claim the costs resulting from those customers as a cost of compliance. Furthermore, perhaps Laclede was not aggressive enough in disconnecting customers during the winter and should not be allowed to claim the costs from those customers as a cost of compliance. Public Counsel does not recommend any specific disallowance for these allegedly overstated costs, instead merely suggesting that the

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[25] Transcript, Page 137, Lines 6-21.

Commission should entirely disallow Laclede's request for determination of costs.

The Commission will not give significant weight to these additional arguments. Commission Rule 4 CSR 240-13.055(G)2 allowed Public Counsel 120 days after Laclede filed its request for determination to submit its position regarding the company's request, with all supporting evidence. These additional challenges are merely suppositions about possible flaws in Laclede's calculations, unsupported by any evidence.

Furthermore, the Commission's rule does not allow the Commission to simply dismiss Laclede's request for determination. Instead, 4 CSR 240-13.055(G)2 requires the Commission to determine the company's reasonably incurred costs within 180 days of the company's filing of a request for determination. If the Commission fails to do so within the time allowed, the amount requested by Laclede is deemed reasonably incurred. Simply finding that Laclede should have considered other possibilities and refusing to make a determination is not an option available to the Commission.

In any event, the Commission finds that the method used by Laclede and Staff to determine Laclede's cost of compliance is reasonable. This is the same method that the Commission accepted last year as the basis for determining Laclede's cost of compliance with the Commission's emergency amendment to the cold weather rule. In fact, it is the same method proposed in Laclede's last rate case by Public Counsel's witness.

Public Counsel correctly points out that the stipulation and agreement that resolved that rate case provides that by agreeing to the stipulated settlement, Public Counsel did not agree to any particular method of cost determination. For that reason, Public Counsel is not precluded from arguing that the method it previously espoused is incorrect and supporting a different method in this or future cases. However, the Commission concludes that the calculation methods it accepted in the recent rate case are still valid for determining Laclede's cost of compliance in this case.

The Commission finds that the $2,494,311 cost of compliance recommended by Laclede and Staff is correct and may be included in Laclede's previously approved AAO.

IT IS ORDERED THAT:

1. The Commission determines that Laclede Gas Company shall include $2,494,311 in the Accounting Authority Order previously approved in this case as its cost of compliance with Commission Rule 4 CSR 240-13.055(14).

2. The determined cost of $2,494,311 shall continue to accumulated interest as provided in Commission Rule 4 CSR 240-13.055(14)(F)3.

3. Laclede Gas Company shall track additional payments and arrearages to customer accounts connected or reconnected as a result of compliance with Commission Rule 4 CSR 240-13.055(14) during the time covered by the Accounting Authority Order previously approved in this case, and shall report its findings to the Commission as part of its next general rate case.

4. Public Counsel's Motion for a Waiver of Commission Rules, filed on April 10, 2008, is denied.

5. This Report and Order shall become effective on April 27, 2008.

Davis, Chm., Murray and Jarrett, CC., concur;
Clayton, C., dissents, dissent to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the award of an Accounting Authority Order (AAO) to Laclede Gas for alleged costs associated with the Cold Weather Rule (CWR).[1] This Commissioner believes that the CWR was never intended to be used as a method of recovering past bad debt of non-paying customers. Granting this AAO may allow recovery of this type of bad debt in the future in the form of a regulatory asset. While there is a debate that the CWR actually may increase a utility's net income and collections, the rule permits the utility to track any costs that may be incurred as a consequence of complying with the rule. Unfortunately, the majority decision inappropriately permits recovery beyond CWR costs by allowing the utility to collect an expense on more than one occasion.

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[1] 4 CSR 240-13.055.

The arrearage charges in dispute are costs that would have been incurred regardless of whether there is a CWR in place. When a utility supplies gas to a customer, it charges that customer for the usage. When a customer fails to pay their bill, the utility then turns off the gas and determines the owed amount to be bad debt. In many cases, that debt may be considered uncollectible at a certain time, perhaps after six months, and the debt is written off. Obviously, uncollectible debt harms the company by increasing its expenses and thus reducing its net income. The Commission has traditionally recognized the burden that such uncollectible debt can place on a utility and this issue usually is presented in a rate case. Normally, the utility receives an annualized allowance built into its revenue requirement under the description of "bad debt expense." Thus, gas utilities already receive compensation for a forecasted amount of bad debt.

The majority incorrectly interprets the CWR to include cost recovery for a percentage of arrearages incurred before a ratepayer reconnects under the CWR. The majority relies on section 4 CSR 240-13.055(14)(F)(4) which reads,

> The costs eligible for recovery shall be the unpaid charges for new service received by the customer subsequent to the time the customer is retained or reconnected by virtue of this section plus the unpaid portion of the difference between the initial payment under this section and the initial payment that could have been required from the customer under the previously enacted payment provisions of section (10) of this rule, as measured at the time of a subsequent disconnection for nonpayment or expiration of the customer's payment plan.

As the Office of Public Counsel (OPC) argues, this provision is in direct conflict with a number of provisions within the same rule which reject the notion of allowing future recovery of costs previously incurred for non-paying customers. OPC cites a number of sections to support its proposition including the following:

> No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section. 4 CSR 240-13.055(14)(F)(2).

> No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section. 4 CSR 240-13.055(14)(F)(4).
>
> The Commission shall establish the amount of costs it determines have been reasonably incurred in complying with this section. 4 CSR 240-13.055(14)(G)(2).
>
> [T]he utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section. 4 CSR 24013.055(14)(G)(1).

This compilation of CWR sections suggests concern with authorizing the future recovery of costs that were not incurred as a result of the CWR. The language in CSR 240- 13.055(14)(F)(2) suggests it is appropriate for recovery of this new cost that would not exist without the CWR, but it would not allow recovery of any of the arrearages which are already folded into rates. One can argue that section CSR 240-13.055(14)(F)(4) allows recovery for the new costs as well as the arrearages. Therefore, it appears that these sections are in direct conflict.

OPC correctly asserts that the CWR was never meant to convert old debt to new debt and allow additional recovery in the future. As described above, the utility already has a component in rates for bad debt expense. OPC alleges in this case that, in addition to the bad debt expense component in rates, the gas utility will be able to collect the same amounts in the form of a CWR AAO. Some would call this "double dipping."

When the Commission promulgated the CWR, there was ample discussion of whether the CWR actually harms utilities or not. Utilities argue that by allowing favorable terms during winter months to customers who do not pay causes an increase in bad debt expense, harming the bottom line. However, some have argued that the CWR actually increases the company's collections because it affords customers a chance to get back on the rolls of the company with a payment plan including provisions for prior bad debt. The company benefits by collecting previously uncollectible debt and by

continuing to sell gas to the customer during its most profitable months.

Rules of interpretation assist in determining which provision of the regulation should be followed. One such rule is that the more specific section controls the general section. Using this guideline to interpret the regulation is not helpful because both sections contain similar levels of detail. While section CSR 240-13.055(14)(F)(4) provides a lengthy description of an equation to be used to calculate the recoverable costs, which includes new and old costs, section CSR 240-13.055(14)(F)(2) and additional provisions of CSR 240-13.055(14)(F)(4) contain language prohibiting collections of old debt unrelated to the CWR.

Additionally, one can assess the conflicting language in terms of the policy behind the regulation and effectuate the regulation's purpose. As authorized in CSR 240-13.055(14)(F), "A gas utility shall be permitted to recover the costs of complying with this section as follows..." As explained above, prior arrearages are not a cost of complying with the section. Therefore, this Commission should decline to authorize the chance for future recovery of prior bad debt and focus strictly on debts associated, directly, with the CWR.

Further, as mentioned above, there is an added policy reason why CSR 240-13.055(14)(F)(2) suggests that only future bad debt be included in the AAO. Past debt is calculated into rates through a bad debt expense, a component already included in the company's revenue requirement. If a company may collect that expense through rates and then recover that cost a second time through the CWR, the utility has collected those funds twice. This violates general fairness and harms all ratepayers.

This Commissioner concurred in the CWR rulemaking because it was time that a new CWR be implemented. While this Commissioner urged the Commission to go further in addressing the significant public health and welfare implications of citizens losing their heating service during the winter months than the final rule did, it was important to move forward with provisions that improved the CWR. This Commissioner and former Commissioner Gaw offered amendments to clarify that no prior debts be collected from the CWR AAO process. It was also important that any increased collections offset any increased debt so that the company does not receive more than what is fair. Additional collections from prior arrearages that are actually received by the company should be

used to offset the future CWR bad debt incurred, if any. Those are collections that the company would not have received without the CWR.

Because of the complexity of the discussion, several examples to illustrate this Commissioner's concerns would be helpful. The first scenario involves the circumstance of a poorly performing customer who fails to make any payments during the CWR period, despite paying the 50% balance to be reinstated.

Scenario 1

	Oct.	**Nov.**	**Dec.**	**Jan.**	**Feb.**	**March**	**Accumulated Usage Total**
Debt/Usage	$1000[2]	$150	$150	$150	$150	$150	$1,750
Customer Payments	**$500[3]**	$0	$0	$0	$0	$0	$500
	Short Payments	($150)	($150)	($150)	($150)	($150)	$1,250

Laclede Position-AAO for $1,050 [$300[4] + $750[5] = $1,050]
Alternative Position—AAO for $250 [$1000[6] - $1,250[7]= -$250]
Utility Benefit - $0[8]

In this instance, the utility is harmed by $250 and should receive an AAO for $250, although Laclede would suggest that an AAO of $1,050 would be appropriate.

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[2] This amount represents arrearage incurred prior to CWR.

[3] This amount represents the 50% payment for reconnection under the CWR.

[4] This amount represents the difference in initial payments to reconnect under the CWR. The CWR requires payment of 50% of arrearage while the prior CWR mandated 80% payment. This figure represents the difference between the 80% figure of $800 and the 50% figure of $500.

[5] This figure represents the total amount short payments by the customer for service during the CWR period.

[6] This amount is the debt existing prior to the customer enrolling in the CWR Program on October 31. If the customer did not enroll in the CWR Program, this debt would still be owed and on the books of the utility.

[7] This figure represents the total amount short payments by the customer for service during the CWR period.

[8] This figure represents payments or gains in revenue the company received because of the CWR. Rather than suffering a loss because of the CWR, the utility actually gained a benefit from the customers' participation in the CWR.

In another scenario, the customer will make the 50% payment and make a consistent but inadequate attempt to keep up with normal winter usage.

Scenario 2[9]

	Oct.	Nov.	Dec.	Jan.	Feb.	March	Accumulated Usage Total
Debt/Usage	$1000	$150	$150	$150	$150	$150	$1,750
Customer Payments	$500	$50	$50	$50	$50	$50	$ 750
	Short Payments	($100)	($100)	($100)	($100)	($100)	$1,000

Laclede Position—AAO for $800 [$300 + $500 – $800]
Alternative Position—AAO for $0 [$1000 - $1000 = $0]
Utility Benefit - $0

In this instance, the utility is no worse off than it would have been without the CWR. The customer was able to receive gas service, the debt owed to the company is no more than it was and the prior debt is to be included in past rate case allocations for bad debt expense.

Scenario 3

	Oct.	Nov.	Dec.	Jan.	Feb.	March	Accumulated Usage Total
Debt/Usage	$1000	$150	$150	$150	$150	$150	$1,750
Customer Payments	$500	$150	$100	$125	$50	$150	$1,075
	Short Payments	($0)	($50)	($25)	($100)	($0)	$675

Laclede Position—AAO for $475 [$300 + $175 = $475]
Alternative Position—AAO for $0 [$1000 - $675 =$325]
Utility Benefit - $325

[9] Footnotes have been omitted from scenarios 2 through 4. The same footnotes apply and should be considered when reviewing each of the examples set out.

In this case, the utility has a lower debt at the end of the CWR than it did prior to enrolling the customer in the program. While the utility's standing is improved by $325 from when the CWR period began, it also gets an AAO for potential collection of an additional $475 in the next rate case, on top of the normal bad debt expense.

Scenario 4

	Oct	**Nov.**	**Dec.**	**Jan.**	**Feb.**	**March**	**Accumulated Usage Total**
Debt/Usage	$1000	$150	$150	$150	$150	$150	$1,750
Customer Payments	$500	$150	$150	$150	$150	$150	$1,250
	Short Payments	($0)	($0)	($0)	($0)	($0)	$500

Laclede Position—AAO for $300 [$300 + $0 = $300]
Alternative Position—AA° for $0 [$1000 - $500 = $500]

Utility Benefit - $500

In this case, the utility received the initial payment of $500 to offset the prior debt and then received full payment for current usage during the CWR period. The utility's standing is improved by $500 compared to if the CWR rule didn't exist or wasn't available. According the majority accounting, despite improving the utility's position by $500, it is also authorized to collect another $300 through the AAO in the next rate case. This example clearly illustrates that the CWR mechanism employed by the majority converts the old debt to new. Despite the benefits that the utility received from the CWR, it can now receive accounting treatment for the old, unrelated debt.

This Commissioner believes that the utility in the present case will now have the opportunity to collect more than what is permitted under the CWR. By authorizing the collection of prior arrearages and by not offsetting those arrearage payments to potentially new debt, the majority may be authorizing the utility to collect more than it should under the law. That is not what the CWR is all about.

For the reasons stated above, this Commissioner respectfully dissents.

In the Matter of The Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company.

Case No. ER-2008-0093
Decided April 23, 2008

Electric §22. The Empire District Electric Company, the Office of the Public Counsel, and the Staff of the Missouri Public Service Commission, through the settlement of various issues, agreed that Empire's revenue requirement shall be increased by $1,248,000, per Staff's revenue requirement calculation, which was based on Empire's present rate revenues and the midpoint of Staff's recommended range of Return on Equity.

ORDER APPROVING STIPULATION AND AGREEMENT AS TO CERTAIN ISSUES

On April 4, 2008, the Staff of the Missouri Public Service Commission, The Empire District Electric Company, and the Office of the Public Counsel filed a Stipulation and Agreement as to Certain Issues, agreeing to disposition of several issues in dispute between the signatory parties. A copy of the Stipulation and Agreement is attached to this order as Attachment A.

The Stipulation and Agreement is nonunanimous in that it was not signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to the stipulation and agreement, then the Commission may treat it as a unanimous stipulation and agreement. More than seven days have now passed since the Stipulation and Agreement was filed and no party has raised an objection.[1] Therefore, the Commission will treat the Stipulation and Agreement as unanimous.

As to those issues disposed of in the Stipulation and Agreement, contingent upon the Commission's acceptance of the Stipulation and Agreement, the parties waived their respective rights to present oral argument and written briefs pursuant to Section 563.080.1 RSMo 2000; their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2 RSMo 2000; their respective rights to

[1] On April 9, 2008, the Missouri Department of Natural Resources filed a response expressly stating it does not object to the Nonunanimous Stipulation and Agreement as to Certain Issues.

rehearing under Section 536.500 RSMo 2000; and their respective rights to judicial review pursuant to Section 386.510 RSMo 2000. Moreover, the signatory parties' witnesses' testimony pertaining to the issues resolved in the Stipulation and Agreement will be accepted into the record without cross-examination or formal submission at the evidentiary hearing. The waiver does not apply to any matters raised in any prior or subsequent Commission proceeding or any matters not explicitly addressed by the Stipulation and Agreement. Commission Rule 4 CSR 240-2.115 gives the Commission the authority to accept a stipulation and agreement as a resolution to certain issues of a contested case.

After reviewing the Stipulation and Agreement, the Commission finds it to be reasonable. The Commission determines that the Stipulation and Agreement shall be approved. In approving the Stipulation and Agreement, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position with regard to these issues and its approval of this Stipulation and Agreement should not be interpreted as such an endorsement in any future case.

IT IS ORDERED THAT:

1. The Stipulation and Agreement as to Certain Issues filed on April 4, 2008, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order as Attachment A.

2. The signatory parties are ordered to comply with the terms of the Stipulation and Agreement as to Certain Issues.

3. This order shall become effective on May 3, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Voss, Regulatory Law Judge

***NOTES:** The Stipulation and Agreement in this case, as well as Attachment A as referenced in this order, have not been published. If needed, these documents are available in the official case files of the Public Service Commission.

Other orders in this case can be found on pages 321 and 634.

In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the TRRO.

Case No. TO-2006-0360
Decided May 7, 2008

Telecommunications §36. Upon reconsideration, the Commission identified one of AT&T Missouri's wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities because the arrangement between two competitive local exchange companies, operating out of AT&T's wire center, necessitates that one of those CLEC's must be counted as a fiber-based collocator.

ORDER REGARDING APPLICATION FOR REHEARING AND/OR RECONSIDERATION

Syllabus: This order denies AT&T Missouri's request to the Missouri Public Service Commission to rehear its conclusion regarding the inclusion of collo-to-collo arrangements in the definition of fiber-based collocator. However, this order grants AT&T's request to the Commission to rehear its finding that AT&T's March 2005 wire center list was incorrect.

Background

On March 31, 2008 the Missouri Public Service Commission issued its Report and Order in this matter. In that order, the Commission concluded that a collocation-to-collocation arrangement does not satisfy the definition of a fiber-based collocator. The Commission's conclusion was based on its interpretation of the Federal Communications Commission's definition of a fiber-based collocator[1] and the arguments presented by the parties.

Consistent with this conclusion, the Commission determined that in March of 2005, AT&T did not correctly identify 14 wire centers as non-impaired.[2] The Commission's determination was based on its finding that NuVox Communications of Missouri, Inc. should not be counted as a fiber-based collocator in a particular wire center.[3] Because NuVox was not counted as a fiber-based collocator, that particular wire center was not counted as a Tier 1 wire center. Under the definition of a Tier 1 wire center, the center must have at least four fiber-based collocators to meet

[1] 47 C.F.R. §51.5.
[2] *See* Case No. TO-2006-0360, Report and Order, page 15.
[3] The identity of the wire center is highly confidential information.

the "non-impairment standard." [4] NuVox's exclusion resulted in the wire center having only 3 fiber-based collocators.[5] Hence, the Commission found that the March 2005 list was incorrect.

AT&T's Application

On April 9, 2008, AT&T Missouri filed its application for rehearing. In its application, AT&T requests that the Commission conclude that a collo-to-collo arrangement should be included in the definition of a fiber-based collocator. AT&T also asserts that even if the Commission does not accept the argument that a collo-to-collo arrangement should be included in the definition of a fiber-based collocator, the wire center in question should nonetheless be included as a Tier 1 wire center.

AT&T's assertion is best explained as follows: NuVox's arrangement with another carrier[6] in the wire center necessitates that one of them be counted as a fiber-based collocator. Because the Commission has excluded NuVox, the second carrier must therefore be included. Including the second carrier would set the number of fiber-based collocators at four. This being so, the wire center should be a Tier 1 wire center having at least four fiber-based collocators.

Order Directing Filing

To better understand and examine AT&T's request with regard to the March 2005 wire center, the Commission issued an order directing NuVox and the Staff of the Commission to file pleadings informing the Commission of whether "the exclusion of NuVox inappropriately excluded the collocator with which NuVox has an arrangement."

Staff's Response

In its response to the Commission order directing filing, Staff points out the following from the record:

- NuVox, through a verified response to Staff, explains why it believes it should not be counted as a fiber-based collocator.[7]
- In the same response, NuVox states that it is likely that another carrier does qualify as a fiber-based collocator.

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[4] 47 C.F.R. §51.319(e)(3)(i).
[5] *See* Exhibit 16, Direct Testimony of AT&T witness Carol Chapman, Attachment CAC-1 HC.
[6] The identity of this carrier is highly confidential.
[7] Exhibit 22, Staff witness Scheperle Direct, HC Schedule 2C-28-29.

- AT&T's witness explains that the arrangement between NuVox and the other carrier is indicative of a fiber-based collocation arrangement.[8]
- CLEC witness Gillan admitted that if either NuVox or the other carrier is counted, then the criterion for the presence of a fiber-based collocator is met.[9]

Staff then goes on to recommend that the other carrier be counted as a fiber-based collocator.

NuVox's Response

NuVox attacks the sufficiency of the evidence reflected in the verified response of its own witness, Mr. Cadieux, stating that he has no personal knowledge of the ownership, operation or network facilities of any carrier other NuVox. NuVox discusses the best evidence rule under Missouri law and concludes that "Mr. Cadieux' affidavit is not direct record evidence that the carrier satisfies the FCC's definition."

NuVox further argues that although Joseph Gillan, a CLEC coalition witness, testified that [if either NuVox or the other carrier is counted in the wire center in question, then the presence of fiber-based collocators is met], this is not evidence that the other carrier is a "fiber-based" collocator. NuVox suggests that the Commission direct the carrier who would be counted to file a statement as to whether it is a fiber-based collocator.

Discussion

The only evidence on this issue indicates that the carrier *is* a fiber-based collocator. There is no evidence to the contrary. In addition to the points made by Staff, AT&T's witness Mr. Nevels testified that there is fiber representing a fiber-based collocator in the wire center.[10] Although NuVox argues that it is cross-connected to another carrier and is therefore not a fiber-based collocator, Mr. Nevels concludes that if NuVox is not counted as a fiber-based collocator then some other carrier must be counted. It is unnecessary, as NuVox has suggested, to require the other carrier verify it status because there is sufficient evidence in the record to support AT&T's assertion.

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[8] Exhibit 18, Carol Chapman Rebuttal.
[9] Transcript, pages 222-23.
[10] Tr. page 175, lines 1-5, 9-17.

In light of the above, the Commission has revisited and will change its finding with regard to the wire center in question. Consequently, the Commission must change its finding on the issue of whether the March 2005 wire center list is correct, but need not address the conclusion that collo-to-collo arrangements are not included in the definition of a fiber-based collocator because AT&T has presented nothing new for the Commission to consider.

IT IS ORDERED THAT:

1. AT&T Missouri's application for rehearing is denied on the issue of whether collo-to-collo arrangement should be included in the definition of a fiber-based collocator.
2. AT&T Missouri's application for rehearing is granted on the issue on whether AT&T correctly identified, in March of 2005, 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities.
3. The Commission finds that AT&T correctly identified 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities.
4. This order shall become effective on May 17, 2008.
5. This case may be closed on May 18, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Jones, Senior Regulatory Law Judge

***NOTE:** Another order in this case can be found at page 280.

In the Matter of The Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company.

Case No. ER-2008-0093
Decided May 20, 2008

Electric §1. The Commission approved The Second and Third Stipulation and Agreement as resolutions of the issues addressed therein.

ORDER APPROVING SECOND AND THIRD STIPULATION AND AGREEMENTS AS TO CERTAIN ISSUES

On May 15, 2008, the Staff of the Missouri Public Service Commission, The Empire District Electric Company, the Office of the Public Counsel, the Missouri Department of Natural Resources, Praxair, Inc., and Explorer Pipeline Company filed a Second Stipulation and Agreement as to Certain Issues ("Second Stipulation"), agreeing to disposition of several issues in dispute between the signatory parties. A copy of the Second Stipulation is attached to this order as Attachment A.

The Second Stipulation is nonunanimous in that it was not signed by all parties. However, Commission rule 4 CSR 240-2.115(2) provides that other parties have seven days in which to object to a nonunanimous stipulation and agreement. If no party files a timely objection to the stipulation and agreement, then the Commission may treat it as a unanimous stipulation and agreement. The only party to this case that did not sign the Second Stipulation, General Mills, Inc., filed a position statement on May 15, 2008, advising the Commission that, although not a signatory to the Second Stipulation, it does not object to the Second Stipulation. Therefore, the Commission will treat the Second Stipulation as a unanimous partial stipulation and agreement.

On May 16, 2008, the Staff of the Missouri Public Service Commission, The Empire District Electric Company, the Office of the Public Counsel, and the Missouri Department of Natural Resources filed a Third Stipulation and Agreement as to Certain Issues ("Third Stipulation"), agreeing to disposition of an additional issue in dispute between the signatory parties. A copy of the Third Stipulation is attached to this order as Attachment B.

The Third Stipulation is also a nonunanimous in that it was not signed by all parties. Each party to this case that did not sign the Third Stipulation[1] filed a position statement on May 18, 2008, advising the Commission that, although not signatory parties to the Third Stipulation, they do not object to the Third Stipulation. Therefore, the Commission will treat the Third Stipulation as a unanimous partial stipulation and agreement.

The Commission conducted an on-the-record presentation regarding the Second and Third Stipulations on May 20, 2008. At that time, the Commission questioned the parties about the various stipulations and agreements.

[1] The non-signatory parties include Praxair, Inc., Explorer Pipeline Company, and General Mills, Inc.

As to those issues disposed of in the Second and Third Stipulations, contingent upon the Commission's acceptance of the Second and Third Stipulations, the parties waived their respective rights to present oral argument and written briefs pursuant to § 563.080.1, RSMo 2000; their respective rights to the reading of the transcript by the Commission pursuant to § 536.080.2, RSMo 2000; their respective rights under § 536.500, RSMo 2000; and their respective rights to judicial review pursuant to § 386.510, RSMo 2000. Moreover, the stipulations provide that signatory parties' witnesses' testimony pertaining to the issues resolved in the Second and Third Stipulations is to be accepted into the record without cross-examination or formal submission at the evidentiary hearing. The waiver does not apply to any matters raised in any prior or subsequent Commission proceeding or any matters not explicitly addressed by the Second and Third Stipulations. 4 CSR 240-2.115 gives the Commission the authority to accept a stipulation and agreement as a resolution to certain issues of a contested case.

After reviewing the Second Stipulation and after hearing the arguments and explanations of the parties, the Commission finds that the Second Stipulation filed on May 15, 2008, should be approved as a resolution of the issues addressed by that Second Stipulation. In approving the Second Stipulation, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position with regard to these issues and its approval of this partial stipulation and agreement should not be interpreted as such an endorsement in any future case.

After reviewing the Third Stipulation and after hearing the arguments and explanations of the parties, the Commission finds that the Third Stipulation filed on May 16, 2008, should be approved as a resolution of the issues addressed by that Third Stipulation. In approving the Third Stipulation, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position with regard to these issues and its approval of this partial stipulation and agreement should not be interpreted as such an endorsement in any future case.

IT IS ORDERED THAT:

1. The Second Stipulation and Agreement as to Certain Issues filed on May 15, 2008, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order as Attachment A.

2. The Third Stipulation and Agreement as to Certain Issues

filed on May 16, 2008, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order as Attachment B.

3. The signatory parties are ordered to comply with the terms of the Second Stipulation and Agreement as to Certain Issues.

4. The signatory parties are ordered to comply with the terms of the Third Stipulation and Agreement as to Certain Issues.

5. This order shall become effective on May 30, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Voss, Regulatory Law Judge

***NOTES:** Another order in this case can be found at page 316.

The Stipulation & Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Branson, Branson West, Reeds Spring, and Hollister, Missouri

Case No. GA-2007-0168
Decided June 24, 2008

Gas §3. The Commission granted Southern Missouri Gas Co., L.P. d/b/a Southern Missouri Natural Gas a full certificate of convenience and necessity to provide natural gas service to Branson, Hollister, and the surrounding unincorporated areas.

Certificates §21. The Commission agreed with staff that Southern Missouri Natural Gas (SMNG) successfully cleared the most critical hurdle facing proponents of getting natural gas into the Branson area, which was obtaining the necessary financing. This was the main factor in determining that SMNG's plan was economically feasible.

APPEARANCES

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REGULATORY LAW JUDGE: Benjamin H. Lane, Judge

SECOND REPORT AND ORDER

Syllabus: *In this Second Report and Order, the Missouri Public Service Commission grants a full certificate of convenience and necessity ("CCN") to Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas ("SMNG").*

Procedural History

[1] Although Mr. Steinmeier and Ms. Young entered their appearances for Ozark Energy Partners, LLC ("OEP") at the evidentiary hearing in this case, several months later, OEP successfully moved to be dismissed as a party to this case. *See* Order Granting Motion to Dismiss OEP as a Party, *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity*, Case No. GA-2007-0168 (Apr. 3, 2008). Mr. Steinmeier and Ms. Young also sought leave to withdraw as counsel for OEP, but that request was denied as moot since OEP was no longer a party. *Id*. at 2 n.3.

In the first Report and Order in this case, which was issued on February 5, 2008, the Commission provided a detailed rendition of the procedural history of this case up to and including the evidentiary hearing. In that Report and Order, which is hereby fully incorporated into this document by reference, the Commission granted SMNG a conditional certificate of convenience and necessity to provide natural gas service to Branson, Branson West, Hollister, and the surrounding unincorporated areas.[2] Among other limitations imposed in the Report and Order, the certificate was "conditioned upon the company's submission of financing arrangements the Commission finds acceptable and its acceptance of non-disposition accounting-related conditions similar to those recommended in the Stipulation And Agreement between Ozark Energy Partners, LLC and Staff in Case No. GA-2006-0561."[3] In addition, the Commission explicitly deferred making findings on two of the five *Tartan Energy* factors[4] – namely, whether SMNG has the financial ability to provide the proposed gas service and whether its proposal was economically feasible – until after the Commission had decided SMNG's consolidated financing application case (Case No. GF-2007-0215).[5]

On February 11, 2008, Staff filed a verified memorandum in Case No. GF-2007-0215 recommending that the Commission approve, subject to certain specific conditions suggested by Staff, SMNG's Second Amended Financing Application for authority to issue up to $15 million in equity capital and $45 million in senior secured debt to finance the company's proposed Branson- and Lebanon-area gas service area expansion projects.[6] On March 27, 2008, after evidently engaging in extensive negotiations, SMNG and OEP filed a Stipulation and Agreement expressing their mutual agreement that the Commission should approve SMNG's Second Amended Financing Application,

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[2] Report and Order, Case No. GA-2007-0168 (Feb. 5, 2008) at 18. The Commission later clarified its Report and Order, noting that "since SMNG has yet to obtain a municipal franchise to serve Branson West, the [conditional] CCN to serve Branson West cannot become 'final' until SMNG is granted the missing franchise." Order Granting SMNG's Motion For Clarification, Case No. GA-2007-0168 (Mar. 20, 2008) at 2.

[3] Report and Order, Case No. GA-2007-0168 (Feb. 5, 2008) at 18.

[4] *See In re Tartan Energy Company*, 3 Mo.P.S.C. 3d 173, 177 (1994).

[5] Report and Order, Case No. GA-2007-0168 (Feb. 5, 2008) at 11-12.

[6] Staff Recommendation, *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas for Authority to Issue Approximately $10 Million in Equity Capital and Approximately $50 Million in Notes and Other Forms of Indebtedness*, Case No. GF-2007-0215 (Feb. 11, 2008).

subject to all the conditions recommended by Staff.[7] On April 17, 2008, the Commission entered an order: (1) approving the March 27, 2008 Stipulation and Agreement in Case No. GF-2007-0215 as "just and reasonable" and directing the parties to abide by its terms; and (2) approving the Second Amended Financing Application subject to all the conditions recommended by Staff.[8]

On June 5, 2008, SMNG filed its Motion to Take Administrative Notice of the Order Approving Financing Application, Request for Order Granting a Full Certificate of Convenience and Necessity, and Approval of Related Tariffs, in which the company stated that it was "now prepared to move forward to exercise a full certificate of convenience and necessity in Case No. GA-2007-0168."[9] In support of its motion, SMNG averred that: (1) it accepted and agreed to abide by accounting-related conditions similar to those recommended in the Stipulation And Agreement between Ozark Energy Partners, LLC and Staff in Case No. GA-2006-0561 with the exception of Section III A(3), which was rejected by the Commission in its February 5, 2008 Report and Order;[10] (2) it had submitted to Staff documents specifying the final terms and conditions for the proposed financing of its proposed gas system;[11] and (3) it had filed revised tariff sheets (Tariff Tracking No. YG-2008-0725) with a proposed effective date of July 5, 2008, which reflected the proposed expansion of its service area to Branson and Hollister.[12] Accordingly, SMNG requested that the Commission make the deferred findings of fact, grant SMNG a full certificate of convenience and necessity to serve Branson and Hollister, and approve the tariffs expanding SMNG's service area to Branson and Hollister.

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[7] Stipulation and Agreement, Case No. GF-2007-0215 (Mar. 27, 2008). OEP had filed a pleading opposing SMNG's financing application just a few days before. *See, e.g.*, Ozark Energy Partners' Statement of Position, Case No. GF-2007-0215 (Mar. 24, 2008).

[8] Order Approving Stipulation and Agreement, Case No. GF-2007-0215 (Apr. 17, 2008). The Commission treated the Stipulation and Agreement as unanimous since the other two parties to the case (Staff and OPC) stated, on the record, that although they had not signed it, they did not oppose it. *Id*. at 3.

[9] Motion of Southern Missouri Natural Gas to Take Administrative Notice of the Order Approving Financing Application, Request for Order Granting a Full Certificate of Convenience and Necessity, and Approval of Related Tariffs, Case No. GA-2007-0168 (Jun. 5, 2008) at 3.

[10] *Id*. at 2 n.1.

[11] *Id*. at 3. Additional documents may have been submitted to Staff a week later. *See* Transmittal Letter and Financing Documents, Case No. GF-2007-0215 (Jun. 12, 2008).

[12] *Id*. With regard to Branson West, SMNG pledged that it would "not begin construction in Branson West until it has received a municipal franchise from [the] community." *Id*. at 2 n.2.

On June 11, 2008, Staff filed its Notice Concerning Recommendation, in which it acknowledged SMNG's June 5 motion and stated that Staff needed more time to thoroughly review the various documents submitted by SMNG in conjunction with the motion. Staff averred that it would file a written recommendation concerning the following issues by no later than June 20, 2008: (1) whether the terms of the financing documents submitted by SMNG were acceptable; (2) whether SMNG is in compliance with the various terms and conditions imposed on the company by the Commission in Case No. GA-2007-0212;[13] (3) whether the tariff sheets filed by SMNG on June 5 (Tariff Tracking No. YG-2008-0725) should be approved to become effective on July 5, 2008; and (4) whether the proposed expansion was economically feasible. Staff filed its verified "Compliance Recommendation" memorandum, which is hereby admitted into evidence, on June 18, 2008. Staff recommended that the Commission approve SMNG's application for a full CCN to serve all areas for which it had applied except Branson West.

Additional Findings of Fact

Does SMNG have the financial ability to provide the proposed service?

Mr. Maffett testified that the estimated total cost of the proposed Branson-area natural gas project is approximately $24 million,[14] consisting of approximately $18 million to build a 35-mile-long supply pipeline from Aurora to the Branson area, and about $6 to $6.5 million to develop and build out the associated distribution system.[15] He further stated that at this point, all of the project design and preliminary engineering work is complete and that SMNG was "basically waiting on the regulatory process and closing the financing" to proceed with the project.[16] In concluding that SMNG has the necessary financial strength to provide the proposed service, Mr. Maffett referred to the company's

[13] In Case No. GA-2007-0212, the Commission granted SMNG a CCN to expand its service area to include Lebanon, Houston, and Licking, subject to certain terms and conditions. *See* Report and Order, *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case No. GA-2007-0212 et al. (Aug. 16, 2007).

[14] Tr. 74:4-6.

[15] Tr. 68:13-22.

[16] Tr. 74:7-13.

then-pending financing application in Case No. GF-2007-0215,[17] a consolidated proceeding in which SMNG sought the Commission's authorization to acquire the necessary funds to complete not only the proposed Branson, Hollister, and Branson West project, but also the company's expansion into Lebanon, Houston, and Licking.[18]

As noted *supra*, the Commission has now decided Case No. GF-2007-0215. In particular, the Commission has now approved both the Second Amended Financing Application (to which Mr. Maffett referred in concluding that SMNG has the necessary financial strength to provide the proposed gas service to the Branson area) and the unanimous Stipulation and Agreement (which the Commission found to be a just and reasonable way of resolving the parties' concerns about SMNG's financial ability to provide the proposed service). This is particularly important in light of Michael Straub's testimony during the hearing, when he explained that historically, what has "prevented other applicants from achieving a successful operation in Branson or even getting gas into the Branson area" has "been the financing problem or the lack of the money in order to develop those systems down there."[19]

Moreover, according to Staff, which recommended approval of SMNG's Second Amended Financing Application, "the peculiarities of the proposed structure of this financing . . . provide Staff reassurance about the intent of the capital provider . . . to provide safe and reliable service" and "to be active in the ongoing operations of SMNG . . . regardless of whether SMNG is able [to] meet its debt service," as opposed to being merely a "passive financial investor in natural gas distribution operations."[20] Finally, as noted by Staff in its Compliance Recommendation, the documents submitted by SMNG show that the final terms and conditions specified therein are consistent with the summary of the proposed terms and conditions Staff reviewed before recommending approval of SMNG's financing application in Case No. GF-2007-0215, and that the structure of the financing is consistent with the key conditions contained in the unanimous Stipulation and Agreement in Case No. GF-2007-0215, which were originally

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[17] Tr. 73:1-6; Tr. 84:5-8. Mr. Maffett went on to say that once the financing was approved, SMNG would have the financial ability to complete the project, Tr. 81:20-24, and that the company "could literally begin construction easily within 30 days of closing the financing" and receiving a full CCN from the Commission. Tr. 83:18-23.

[18] Tr. 81:2-4; Tr. 81:20-25. See also the Second Amended Financing Application filed by SMNG in Case No. GF-2007-0215 on December 17, 2007.

[19] Tr. 245-46:21-7.

[20] Staff Recommendation, Case No. GF-2007-0215 (Feb. 11, 2008) at 6-7 (NP).

recommended by Staff.[21]

For all these reasons, the Commission finds that SMNG is financially capable of providing the proposed natural gas service in Branson, Hollister, Branson West, and the surrounding unincorporated areas.

Is SMNG's proposal economically feasible?

The Commission believes that the Feasibility Study prepared by SMNG,[22] which concluded that the proposed expansion was indeed economically feasible[23] and was the subject of extensive and vigorous criticism by OEP's witness Steven Cattron and equally extensive and vigorous rebuttal testimony from Mr. Maffett, is a useful tool in helping determine whether SMNG's proposal is economically viable. Under the circumstances presented here, however, including the fact that OEP (the party which sponsored Mr. Cattron as a witness in the first place) is no longer opposed to the relief sought by SMNG in this case and was dismissed as a party on its own motion,[24] as well as the fact that OEP later *joined* SMNP in a Stipulation and Agreement which resolved the financing case,[25] the Commission finds it unnecessary to systematically address each and every one of the alleged flaws of the Feasibility Study identified by Mr. Cattron in his testimony. It is enough to observe that although the Feasibility Study conducted by SMNG may not have used the best possible data or employed the perfect methodology, the Commission believes that its ultimate conclusion – that SMNG's proposed expansion into the Branson area is economically feasible – is correct. In its Compliance recommendation, Staff found that although "expansion to the Branson area contains significant economic risks," SMNG's proposal "is economically feasible if key assumptions like the future costs of natural gas, the future costs of propane, the construction of the distribution system, and the conversion rate for existing propane customers are correct."[26]

The Commission finds that those "key assumptions," some of which were based on an "independent outside third-party analysis that [SMNG] had [commissioned] . . . which [produced the data on] the propane, propane/electric, electric-only mix and the survey questions

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[21] Staff's Compliance Recommendation ("Compliance Rec."), Case No. GA-2007-0168 (Jun. 18, 2008) at 2.

[22] Appendix C to Exhibit 2 (HC).

[23] Appendix C to Exhibit 2 (HC); Tr. 259:6-13.

[24] Order Granting Motion to Dismiss OEP as a Party, Case No. GA-2007-0168 (Apr. 3, 2008) at 2.

[25] Stipulation and Agreement, Case No. GF-2007-0215 (Mar. 27, 2008).

[26] Compliance Rec. at 2-3.

that were asked in that about customers' willingness to switch,"[27] are reasonable. As Mr. Maffett replied in response to a question as to whether anything Mr. Cattron had said during his testimony caused him to question the economic feasibility or viability of SMNG's proposed expansion into the Branson area:

> Not a thing. We – we have relied on over 300 years of natural gas industry experience with our management team, with our employees, we've relied upon the data and the analysis we have from over 7,000 residential and commercial and industrial customers over 12 years of operating history [in six counties] to – to form the basis of our analysis. This is the same basis that was used in Lebanon, and it was the same basis used for Houston and Licking.[28] Again, the demographics change with each area, but the underlying assumptions and the underlying fundamentals have all been predicated on historical operating results and they've all been consistently applied.[29]

The Commission further believes that SMNG's ability to secure acceptable financing is *also* a useful tool in determining whether the company's proposal is economically feasible, since it would indicate that a sophisticated, profit-motivated lender had determined that the company's proposal met objective criteria for economic feasibility.[30]

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[27] Tr. 405:15-20 (HC).

[28] As noted in Footnote 13 *supra*, in Case No. GA-2007-0212, the Commission granted SMNG a CCN to expand its service area to include Lebanon, Houston, and Licking, subject to certain terms and conditions. As in the present case, Staff filed a recommendation supporting SMNG's application in that case. Tr. 257:11-14; 258:10-19. Staff's positive recommendation in that case was based, in relevant part, upon the feasibility analysis provided by SMNG. Tr. 414:4-7 (HC).

[29] Tr. 413:7-24 (HC). Mr. Maffett had previously testified that SMNG's "actual experience" was the primary basis of the feasibility study projections. Tr. 405:9-12 (HC).

[30] For example, Mr. Cattron testified that as a sophisticated lender himself, he would not rely solely on a prospective borrower's representations in deciding whether to finance a proposed business venture, but "would certainly do that analysis and homework" himself as well. Tr. 366:15-20 (HC). It also bears noting that during the hearing, Mr. Maffett expressly agreed to have SMNG's shareholders bear the economic risks associated with the expansion of its service area to the Branson area (just as in the Lebanon case), including a failure to achieve forecasted conversion rates and/or customer growth projections. Tr. 87-88 *passim*. In the first Report and Order, the Commission required SMNG to agree to this as a condition of being issued a conditional CCN. Report and Order, Case No. GA-2007-0168 (Feb. 5, 2008) at 18.

Indeed, as Staff stated in its Compliance Recommendation:

> All utilities, even well established utilities, face economic risks so the existence of economic risks should not be the sole criterion on which to determine economic feasibility. Staff maintains that SMNG's ability to obtain financing to proceed with the project is a reasonable criterion for assessing economical feasibility[.][31]

Moreover, as Mr. Straub explained at the hearing:

> [A]lthough the feasibility study is an extremely important part of the application, the feasibility study has not been the mechanism that's prevented other applicants from achieving a successful operation in Branson or even getting gas into the Branson area. It's been the financing problem or the lack of the money in order to develop those systems down there. So in Staff's view, the most important issue in [SMNG's application is its] ability to get the financing that would enable [it] to build the systems.[32]

Obviously, as noted *supra* (and unlike all previous applicants), SMNG has now successfully cleared the most critical hurdle facing proponents of getting natural gas into the Branson area – obtaining the necessary financing.

For all these reasons, the Commission finds that SMNG's proposal to provide natural gas service in Branson, Hollister, Branson West, and the surrounding unincorporated areas is economically feasible.

<u>Compliance Tariffs</u>

On June 5, 2008, SMNG filed revised tariff sheets with a proposed effective date of July 5, 2008, for the purpose of complying with the Commission's first Report and Order issued on February 5, 2008.[33] These tariff sheets contain maps showing the Commission-approved service area, metes and bounds descriptions, and other applicable tariff provisions necessary for SMNG to provide natural gas

[31] Compliance Rec. at 3. Staff proceeded to recommend that the Commission "make a finding that [SMNG's] request to provide natural gas service in the requested service area is economically feasible." *Id*.

[32] Tr. 245-46:21-7.

[33] *Id*.

service in the expanded service area.[34] Staff reviewed each of the tariff sheets, as filed by SMNG on June 5, 2008, and concluded that they are in compliance with the Commission's first Report and Order.[35] Accordingly, Staff has recommended that the revised tariff sheets be approved to become effective on July 5, 2008.[36] The Commission agrees with Staff in all respects regarding the tariff sheets in question.

Additional Conclusions of Law

Courts may take judicial notice of their own records in other prior proceedings on their own motion or at the request of a party.[37] Therefore, the Commission may take official notice of facts demonstrated by its own records in prior cases involving the parties pursuant to Section 536.070(6), RSMo 2000, which states, in relevant part, that in all contested cases, administrative "[a]gencies shall take official notice of all matters of which the courts take judicial notice."

Section 393.170.2, RSMo 2000, states that before the Commission issues a certificate authorizing a gas corporation to construct a gas plant and function as a public utility serving a municipality, "a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities." So, while it is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate,[38] the Commission may not grant a public utility a certificate of convenience and necessity to serve a municipality unless the applicant has already obtained the consent of the municipality (typically by means of a local franchise ordinance), which is an "essential prerequisite to lawful exercise of the rights therein mentioned."[39]

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 4.

[37] *See In re Estate of Ayers*, 984 S.W.2d 193, 196 (Mo. App. S.D. 1998); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. W.D. 1998); *Turner v. State*, 669 S.W.2d 642, 644 (Mo. App. S.D. 1984).

[38] *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993) (citing *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. App. W.D. 1975)).

[39] *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 350, 53 S.W.2d 394, 399 (Mo. banc 1932) (interpreting what are now Sections 71.520 and 393.010, RSMo 2000).

Decision

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the findings of fact made above and in the first Report and Order to the conclusions of law as stated in both orders, the Commission concludes that authorizing SMNG to provide natural gas service to Branson, Hollister, and the surrounding unincorporated areas is necessary and convenient for the public service. Accordingly, the Commission will issue SMNG a full certificate of convenience and necessity to provide such service, and will approve the revised tariff sheets submitted by SMNG to become effective on July 5, 2008. SMNG will not be granted a full CCN to provide natural gas service to Branson West until the company demonstrates to the Commission that it has been granted a municipal franchise to serve that community.

IT IS ORDERED THAT:

1. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas is granted a full certificate of convenience and necessity to provide natural gas service to Branson, Hollister, and the surrounding unincorporated areas.

2. The Commission makes no finding as to the prudence or ratemaking treatment to be given any costs or expenses incurred as a result of the granting of this certificate of convenience and necessity, except as otherwise addressed in this Second Report and Order or the first Report and Order issued on February 5, 2008.

3. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall not begin construction of any facility in Missouri for the purpose of offering natural gas service to Branson, Hollister, or the surrounding unincorporated areas until this order becomes effective. The company must commence construction within one year after this order becomes effective.

4. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall not be granted a full certificate of convenience and necessity to provide natural gas service to Branson West until the company demonstrates to the Commission that it has been granted a municipal franchise to serve that community.

5. Within 10 days after closing and final execution of the financing arrangements approved by the Commission in Case No. GF-2007-0215, Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall submit to Staff a copy of all finally executed documents relating to the financing. If any of these documents contain material changes as compared to those previously submitted to Staff by the company, Staff shall promptly notify the Commission.

6. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas remains subject to and shall comply with all terms and conditions set forth in ordered paragraphs 1 and 3 of the Commission's Report and Order of February 5, 2008 in Case No. GA-2007-0168,[40] as well as those contained in ordered paragraphs 2 and 3 of the Commission's April 17, 2008 order approving the Stipulation and Agreement in Case No. GF-2007-0215.

7. Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas shall provide the items listed in Sections III.M and III.N of the Stipulation and Agreement between OEP and Staff in Case No. GA-2006-0561 to Staff and Public Counsel at least 60 days before the company delivers any natural gas to customers in its expanded service area.

8. The following tariff sheets filed by Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas on June 5, 2008 (Tariff Tracking No. YG-2008-0725) are approved to become effective on July 5, 2008:

P.S.C. Mo. No. 1

Original Sheet No. xi
Original Sheet No. xii
Original Sheet No. v.1
Original Sheet No. v.2
Original Sheet No. v.3
First Revised Sheet No. 4, Cancelling Original Sheet No. 4

[40] The terms and limitations set forth in ordered paragraph 1 of the Commission's Report and Order of February 5, 2008 in Case No. GA-2007-0168 include the following sections of the Stipulation and Agreement between OEP and Staff in Case No. GA-2006-0561: Sections III.A.1 and III.A.2 (Financial Issues); III.B (Service Territory); III.C (Construction); III.D (Territorial Issues); III.E (Tariffs); III.F (Service Quality); III.G (Depreciation); III.H (Financing); III.I (Ownership); III.J (Adherence to Missouri Rules); III.K (Affiliate Transactions); III.L (Corporate Allocations); III.M (Reliability and Natural Gas Supply Planning); III.N (Hedging); III.O (PGA/ACA Review); III.P (Gas Safety); III.Q (Uniform System of Accounts); and III.R (Surveillance).

9. This order shall become effective on July 5, 2008.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo.

In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2008

Case No. AO-2008-0395
Decided June 24, 2008

Public Utilities §1. The Commission estimated its Fiscal Year 2009 Assessment to be $16,240,170.

ASSESSMENT ORDER FOR FISCAL YEAR 2009

Pursuant to 386.370, RSMo Supp. 2007, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2008. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to $18,321,674. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups $9,931,938. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of $8,389,736.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be $300,000. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2008, is estimated to be $1,781,504. The Commission deducts these amounts and estimates its Fiscal Year 2009 Assessment to be $16,240,170. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all

groups' gross intrastate operating revenue for the calendar year of 2007, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at http://www.psc.mo.gov.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	$ 6,558,795
Gas	$ 4,742,363
Heating	$ 127,496
Water	$ 1,422,130
Sewer	$ 377,034
Telephone	$ 3,012,352
Total	$ 16,240,170

The Commission allocates a proportionate share of the $16,240,170 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2008. The assessment shall be due and payable on or before July 15, 2008, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2008, October 15, 2008, January 15, 2009, and April 15, 2009. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

IT IS ORDERED THAT:

1. The assessment for fiscal year 2009 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2008.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dale, Chief Regulatory Law Judge

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief.*

Case No. EM-2007-0374
Date Decided July 1, 2008

Electric §4. The Commission authorized Great Plans Energy Inc. to acquire and assume the stocks, bonds, and other indebtedness and obligations of Aquila, Inc. The Commission further authorized Aquila, Inc. to merge with Gregory Acquisition Corporation. Authorization for both transactions was subject to conditions.

* This case was appealed to the Missouri Supreme Court and affirmed. See 344 SW 3d 178, (Mo banc 2011).

REPORT AND ORDER

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Jane L. Williams and **Scott Brown**, BLAKE & UHLIG, P.A., 753 State Avenue, Suite 475, Kansas City, Kansas 66101, for: **International Brotherhood of Electrical Workers, Local Unions No. 412, 695, 814, 1613, and 1464**.

John B. Coffman, Attorney at Law, 871 Tuxedo Boulevard, St. Louis, Missouri 63119, for: **Frank Dillon, Kimberly Miller, James E. Doll, Randy Cooper, Gary Crabtree, and Eric Thompson and Allen Bockelman (collectively, the "South Harper Residents")**.

Lewis R. Mills, Jr. Public Counsel, Office of the Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office

Box 2230, Jefferson City, Missouri 65102, for: **Office of the Public Counsel and the public**.

Kevin A. Thompson, General Counsel, **Steven Dottheim**, Chief Deputy General Counsel, **Nathan Williams**, Deputy General Counsel, and **Sarah Kliethermes**, Assistant General Counsel, Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102, for: **Staff of the Missouri Public Service commission**.

REGULATORY LAW JUDGES: Harold Stearley, Regulatory Law Judge, and Nancy Dippell, Deputy Chief Regulatory Law Judge.

Syllabus: The order conditionally approves Great Plains Energy Incorporated's, Kansas City Power & Light Company's, and Aquila, Inc.'s, request for authority to merge Aquila, Inc., with Gregory Acquisition Corporation, with Aquila, Inc., becoming the surviving entity.

I. Procedural History

On April 4, 2007, Great Plains Energy Incorporated ("Great Plains" or "GPE"), Kansas City Power & Light Company ("KCPL"), and Aquila, Inc., pursuant to Sections 393.180, 393.190, 393.200, 393.210 and 393.220, RSMo 2000,[1] and Commission Rules 4 CSR 240-2.060, 240-3.020, 240-3.110, 240-3.115, 240-3.120, 240-3.125, and 240-20.015, filed a joint application with the Missouri Public Service Commission. The Applicants requested authority for a series of transactions whereby: (1) Black Hills Corporation, a South Dakota corporation owning both regulated and non-regulated businesses, would acquire Aquila's gas assets in Iowa, Nebraska, Kansas, and Colorado and electric assets in Colorado for $940 million, subject to closing adjustments ("Black Hills Purchase");[2] and (2) Gregory Acquisition Corp. ("Gregory"), a Delaware corporation and a direct, wholly-owned subsidiary of Great Plains would be merged with and into Aquila, with Aquila as the surviving entity (referred to as "the merger").

The result of the merger is that Great Plains will effectively acquire Aquila's Missouri electric and steam operations, as well as its

[1] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.
[2] See Application to Intervene of Black Hills, pp. 1-2, filed April 27, 2007, and Finding of Fact Number 5.

merchant services operations, which primarily consist of the 340 MW Crossroads generating facility in Mississippi, and certain residual natural gas contracts. Aquila would ultimately become a direct, wholly-owned subsidiary of Great Plains.

A. Notice and Interventions

On April 9, 2007, the Commission issued notice of the proposed transactions, and set an intervention deadline of April 30, 2007. On April 24, the Commission directed Aquila to send individual notice of the proposed transactions to its customers no later than its next billing cycle. Aquila filed its notice of compliance with that order on May 9, 2007.

On May 10, 2007, the Commission set a technical conference for May 23, 2007, and a prehearing conference for May 24, 2007, to allow the parties to further discuss the details of the proposed merger and to determine the procedural schedule to be followed in this matter. The Commission granted requests for intervention for the following entities on May 15: (1) Ag Processing, Inc., a Cooperative; (2) Praxair, Inc.; (3) Sedalia Industrial Energy Users' Association; (4) City of Kansas City, Missouri; (5) International Brotherhood of Electrical Workers Local Unions Nos. 412, 1464, 1613, 695, and 814; (6) Dogwood Energy, L.L.C.; (7) Missouri Joint Municipal Electric Utility Commission; (8) City of Lee's Summit, Missouri; (9) City of Independence, Missouri; (10) City of St. Joseph, Missouri; (11) Cass County, Missouri; (12) Black Hills Corporation; and (13) Frank Dillon, Kimberly Miller, James E. Doll, Randy Cooper, Gary Crabtree, Eric Thompson, and Allen Bockelman (collectively, the "South Harper Residents").

On July 13, 2007, the Commission received a late application to intervene from the United States Department of Energy, the National Nuclear Security Administration, and the Federal Executive Agencies. This unopposed application was granted on July 27, 2007.

B. Initial Procedural Schedule, Hearing Dates and Issues List

On June 19, 2007, the Commission adopted the procedural schedule proposed by the parties. This schedule culminated in an evidentiary hearing scheduled for December 3-14, 2007. On November 21, the parties jointly filed the list of issues they believed required decisions from the Commission. Notably, the parties stressed: "This 'non-binding' listing of issues is not to be construed as impairing any party's ability to argue about any of these issues or related matters,

or to restrict the scope of its response to arguments made by other parties."[3]

The hearing convened on December 3;[4] however, on December 6,[5] the Applicants proposed suspending the proceedings to give the parties time to review an alternative merger proposal. That unopposed request was granted.[6]

C. Resumption of Evidentiary Hearing and Revised Issues List

On March 11, 2008,[7] the Commission adopted an updated procedural schedule setting April 21 as the date for the evidentiary hearing to resume. On April 16, 2008, after the granting of a one-day extension, the Staff of the Missouri Public Service Commission ("Staff") filed with the Commission its "Second List Of Issues And Order Of Opening Statements, Witnesses And Cross-Examination." Paragraph 9 of this filing reads as follows:

> 1. The parties agree the listing of issues below is not an agreement by any party that any particular listed issue is, in fact, a valid or relevant issue. Indeed, in their prehearing briefs, some parties may state that they consider a particular listed issue to not be a valid issue. This "non-binding" listing of issues is not to be construed as impairing any party's ability to argue about any of these issues or related matters, or to restrict the scope of its response to arguments made by other parties.

1. That list, as well as the proposed dates for hearing testimony on each issue, included:

> **Merger Synergy Savings**
> 1. Are the estimates of savings from synergies reliable?
> A. Could any of the synergy savings be achieved by KCPL or Aquila on a stand-alone basis absent the acquisition/consolidation/integration?

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[3] *List of Issues and Order of Opening Statements, Witnesses and Cross-Examination*, Paragraph 5, Case No. EM-2007-0374, filed November 21, 2007.
[4] Transcript, Volume 3.
[5] Chairman Davis, *sua sponte*, recused himself from this matter on December 6. See EFIS Docket Number 128, *Notice of Recusal*, filed December 6, 2007.
[6] Transcript, pp. 1154-1158.
[7] All dates from this point forward in the order refer to the year 2008 unless otherwise noted.

B. Are any of the identified synergy savings dependent on KCPL and Aquila consolidating/integrating/merging their operations?

2. Is it likely that the actual synergy savings exceed the sum of the transaction, transition and incremental interest costs that the Joint Applicants propose to recover over the first five (5) years following the acquisition/merger/consolidation? If not, is the proposed merger not detrimental to the public interest?

Transaction Cost Recovery
1. Should transaction costs be directly charged to ratepayers through cost of service amortizations? Would the proposed merger be detrimental to the public interest if the Commission did so?

Affiliate Transactions Rule Waiver/Variance
1. Should GPE/KCPL and Aquila be granted a waiver/variance from the provisions of the affiliate transactions rule under 4 CSR 240-20.015 as it might pertain to transactions between Aquila and KCPL? Will the proposed merger be not detrimental to the public interest if the Commission does so?

2. Have GPE/KCPL and Aquila complied with the Commission's rules regarding a request for a waiver or variance from the affiliate transactions rule, such as the requirement regarding making a showing of good cause?

3. Have GPE/KCPL and Aquila provided adequate details for there to be clarity respecting what provisions of the affiliate transactions rule that GPE/KCPL and Aquila are seeking relief from?

Service Quality
1. Can service quality problems resulting from a merger/consolidation/acquisition of a works or system necessary or useful in the performance of duties to the

public preclude the merger/consolidation/acquisition from being not detrimental to the public interest?

2. Has GPE/KCPL taken adequate measures to ensure that its proposed postconsolidation/post-merger/post-acquisition operations will not be detrimental to the public interest by precluding service quality issues arising from the consolidation/merger/acquisition?

Transmission and RTO/ISO Criteria

1. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of their intent to have Aquila participate in the Midwest ISO rather than SPP?

2. Have Applicants demonstrated that the proposed transaction is not detrimental to the public interest even though they have not addressed the rate and other impacts of potential joint dispatch of the combined companies' generation resources, including the impacts on transmission and interconnection availability?

3. Should Commission approval of the Joint Application be conditioned upon Aquila being required to join and operate its generation and transmission facilities under the auspices of the Southwest Power Pool (SPP) Regional Transmission Organization (RTO) with KCPL within four (4) months of approval of the merger?

4. Should Commission approval of the Joint Application be conditioned upon Aquila and KCPL being required to consolidate their balancing authority areas within six (6) months of approval of the merger?

Municipal Franchise

1. Should Commission approval of the Joint Application be conditioned upon the negotiation of a single, unitary franchise between KCPL/Aquila and the City of Kansas

City within nine (9) months of the Commission's approval of the merger?

Quality of Service Plan and Earnings Sharing Mechanism

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file an application for a Quality of Service Plan within 90 days of the Commission's final decision in this proceeding?

2. Should Commission approval of the Joint Application be conditioned upon establishment of an Earnings Sharing Mechanism that returns to customers excess earnings of KCPL/Aquila above an authorized level?

Future Rate Case

1. Should Commission approval of the Joint Application be conditioned upon requiring KCPL/Aquila to file a comprehensive rate case with respect to the merged operations within three (3) years of the Commission's approval of the merger?

Additional Amortization / Credit Worthiness

1. Is the credit-worthiness of KCPL and Aquila as a result of the GPE acquisition of Aquila dependent on the expectation that GPE/KCPL/Aquila will seek and the Commission will authorize a regulatory plan similar to that contained in the KCPL Stipulation and Agreement in Case No. EO-2005-0329 subsequent to Commission authorization of GPE's acquisition of Aquila?

2. If yes, will KCPL's credit-worthiness, and thereby the purpose of the KCPL Regulatory Plan, be negatively affected if Aquila is unable to obtain such a Regulatory Plan?

3. Is the current expected cost and schedule outcome relating to KCPL's infrastructure commitments from the Case No. EO-2007-0329 Regulatory Plan an indication of GPE and KCPL's ability to complete the acquisition

transaction in a manner that is not detrimental to the public interest?

4. Is KCPL's creditworthiness affected by GPE's decision not to seek recovery from Missouri ratepayers of any of the debt repurchase costs of Aquila's existing debt that GPE will refinance post-closing?

Anonymous Public Allegations/Comments Related to Proposed Acquisition

(a) Would the adoption of GPE/KCPL's gift and gratuity practice for Aquila be detrimental to the public interest?

(b) Does KCPL have adequate control of the Iatan projects to be able to operate the nondispatch functions of Aquila in addition to those of KCPL in a manner not detrimental to the public interest?

(c) Does the Commission have adequate information to determine whether the public allegations/comments it has received regarding GPE/KCPL are accurate and such conduct in the operation of the non-dispatch functions of Aquila would be detrimental to the public interest?

2. The parties also enumerated five items which some or all of them considered to be "legal issues."[8]

In addition to the fact that the issues list was not binding on the parties, the Commission did not adopt the list of issues as filed by Staff for two reasons: it was not agreed to by the parties; and, Staff's framing of the issues may not accurately reflect the material issues to this matter under the applicable statutes and rules.

[8] The Commission notes that lists of issues submitted by the parties do not always frame the issues accurately or, in fact, reflect the material issues correctly in any given case pursuant to the applicable statutes and Commission rules. Consequently, the Commission does not automatically adopt any proposed issues list, and as is the case in this matter, the Commission deemed it inappropriate to adopt the issues list because of the parties' failure to accurately delineate the issues requiring the Commission's decision.

D. Great Plains and KCPL's Motion to Limit the Scope of the Proceedings

1. Overview

On April 17, after Staff filed its proposed revised list of issues, Great Plains and KCPL moved "to limit the scope of this proceeding to evidence relating to whether the proposed acquisition of Aquila is not detrimental to the public interest, which is the standard that the Commission is required to apply by law."[9] The motion identified several issues that Great Plains and KCPL believed were either totally or partially irrelevant to the Commission's determination, and requested that the Commission restrict evidence to that which was relevant and decline to hear certain purported evidence that Great Plains and KCPL believed to be completely irrelevant. Great Plains and KCPL further requested that certain witnesses be released from the proposed procedural schedule for the hearing believing their testimony into these alleged irrelevant issues should not be required. The issues that were the subject of Applicant's motion included:[10]

(1) An inquiry into four anonymous letters that, during the course of this proceeding, were directed to various Commissioners, either participating or not participating in this matter; the subject of which pertained to Applicant's financial ability to effectuate the proposed merger.[11]

(2) An inquiry into the Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy.

(3) An inquiry into a plan for regulatory "Additional Amortizations" that appeared in the Applicant's original application but was subsequently removed and is not being requested.

(4) An extensive inquiry into to KCPL's Comprehensive Energy Plan ("CEP") set forth in the Stipulation and Agreement approved by the Commission in Case

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[9] EFIS Docket Number 309, Great Plains Energy's and KCPL's Motion to Limit Scope of the Proceeding to Evidence Relating to Whether the Proposed Acquisition of Aquila by Great Plains Energy, Inc. Is Not Detrimental to the Public Interest, filed April 17, 2000; See also 4 CSR 240-3.115(1)(D).

[10] See Issues X and XI, Staff's Second List of Issues and Order of Opening Statements, Witnesses and Cross-Examination at 10-11 ("Staff's Second List of Issues").

[11] A fifth anonymous letter was received by the Commission on May 12, after the hearing had adjourned. It was filed by the Commissioners in this docket on May 13.

> No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects.

3. Great Plains and KCPL further stated:

> 2. To be clear, the Applicants do not object to evidence related to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.
>
> 3. A number of the Applicants' witnesses who have submitted prefiled testimony can address these issues, including Great Plains Energy's Chief Financial Officer Terry Bassham; Great Plains Energy's Vice-President of Investor Relations and Treasurer Michael Cline; and KCPL's Vice President of Administrative Services Lora Cheatum. Additionally, the Applicants will produce William H. Downey, President and Chief Executive Officer of KCPL, to provide testimony on the relationship of the CEP projects (including the status of the Iatan Unit 1 environmental retrofit and Iatan Unit 2 construction) to the acquisition of Aquila. He will also be able to advise the Commission on the status of the reforecast that is underway regarding construction costs and schedules at the Iatan Generating Station.

4. Great Plains and KCPL finally noted:

> 4. However, the wide range of inquiries conducted during the depositions of 11 Great Plains Energy/KCPL witnesses and 5 Aquila witnesses during the past three weeks indicates that Staff is pursuing the "fishing expedition" and a "full re-evaluation of the CEP in the context of this case," contrary to the Commission's directive of March 20. See Order Denying Motion to Quash Deposition Subpoenas at 3-4. Issues X and XI of Staff's Second List of Issues demonstrate that Staff plans to continue this trek into areas that are not relevant to whether the proposed merger is not detrimental to the public interest. The Commission should not require the Applicants to produce for hearing: (1) Michael J. Chesser, Great Plains Energy Chairman of the Board

and Chief Executive Officer; (2) Stephen Easley, KCPL's Senior Vice President of Supply; (3) Brent Davis, KCPL's Iatan Unit 1 Project Director; (4) Terry Foster, KCPL's Director of Project Controls for CEP projects; (5) Steven Jones, KCPL's CEP Procurement Director; (6) John R. Grimwade, KCPL's Senior Director of Strategic Planning and Development.

5. If Staff feels compelled to introduce evidence from these witnesses, the Commission should require Staff to designate from each witnesses' deposition the pages and lines that it proposes to offer. All other parties will then be able to raise objections or agree that such passages may be admitted.

On April 21, the evidentiary hearing resumed following its December 6, 2007 suspension.[12] During the course of the proceedings, the Presiding Officer raised the need to rule on the Applicant's motion. The Presiding Officer stressed the need to ensure all parties a full and fair opportunity to respond to the Applicant's motion, while also noting that the procedural schedule for the hearing would bring these issues into the hearing as early as April 24.[13]

Ultimately, the parties agreed to have the Presiding Officer rule on the Applicant's motion on April 24. As of April 24, the parties had seven days to file written responses to the motion, and the parties were given the additional opportunity to provide oral argument on the motion at the hearing on April 24. No party requested additional time to respond to Applicant's motion and no party objected to the Commission taking up the motion on April 24.

The Commission's Staff filed a written response to the Applicant's motion on April 24, and its oral argument at hearing on this motion echoed its written response. The gravamen of Staff's response is that: (1) it does not propose that the Commission decide matters on the basis of the content of anonymous complaints, but rather from the basis of sworn testimony from individuals regarding the anonymous complaints; (2) it believes Aquila's approach to cost overruns and schedule slippage (in relation to the Iatan construction projections), and Aquila's approach to gifts and gratuities are superior to those of Great

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[12] Kevin Gunn officially commenced his term as Commissioner on April 21. On April 24, Commissioner Gunn recused from this matter *sua sponte*. See EFIS Docket Number 320, *Notice of Recusal*, filed April 24, 2008.
[13] Transcript, pp. 1202-1203, 1441-1442, 1608-1610, 1917-1918, and 2073-2120.

Plains and KCPL and the Commission should require the adoption of Aquila's approach should the merger be approved; (3) the issue of a proposed future regulatory plan involving "Additional Amortizations" is relevant in this proceeding as it is related to the Applicant's credit-worthiness and that the Commission must hear this evidence because of the Missouri Supreme Court decision in *State ex rel. A.G. Processing v. Public Serv. Comm 'n*;[14] and (4) the Commission should take a broad view of the relevance of KCPL's Comprehensive Energy Plan ("CEP") to the ultimate issue pending before the Commission. Staff further requests that the Commission not release the witnesses as requested by the Applicant so that they may provide the testimony that Staff believes is relevant to these issues.

Ag Processing, Inc, Sedalia Industrial Energy Users' Association and Praxair, Inc., (collectively referred to as "Industrial Intervenors" or "Industrials") also filed a written response to the Applicant's motion. Similarly to Staff, the Industrials' oral arguments on the motion also echoed its written response. The Industrials stated that their particular interest was to ensure that evidence regarding the Applicant's credit-worthiness be entered into the record. The Industrials further stated that they supported Staff's position on the remaining issues.

The Office of the Public Counsel ("Public Counsel") echoed support for Staff's and the Industrials' positions opposing the Applicant's motion. Public Counsel further stated that with regard to the issue concerning a potential future regulatory plan involving "Additional Amortizations" that the Commission should, at minimum, hear an offer of proof on this issue and preserve that evidence in the record.

2. Commission Ruling on the Motion to Limit the Scope of the Hearing

On April 24, following oral argument at the evidentiary hearing, the Presiding Officer, pursuant to the authority delegated by the Commission[15] ruled as follows:

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[14] 120 S.W.3d 732 (Mo. banc 2003).

[15] See Commission Rules 4 CSR 240-2.110, 2.120 and 2.130. Commission Rule 4 CSR 240-2.110(4) provides: "The presiding officer may limit the number of witnesses, exhibits, or the time for testimony including limitations consistent with the application of the rules of evidence."

Commission Rule 4 CSR 240-2.120(1) provides:

> A presiding officer shall have the duty to conduct full, fair and impartial hearings, to take appropriate action to avoid unnecessary delay in the

(1) Purported evidence regarding the anonymous letters is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.
(2) Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.
(3) While the Commission believes that any purported evidence regarding a future plan for regulatory "Additional Amortizations" is irrelevant, it is not wholly irrelevant, and the Commission will preserve this evidence in the record as an offer of proof.
(4) An extensive inquiry into to KCPL's CEP as set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects is overly broad and the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.
(5) The witnesses that the Applicant's have requested to be released in this matter will not be released to the extent

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disposition of cases, to maintain order, and shall possess all powers necessary to that end. The presiding officer may take action as may be necessary and appropriate to the discharge of duties, consistent with the statutory authority or other authorities under which the commission functions and with the rules and policies of the commission.

Commission Rule 4 CSR 240-2.130(3) provides:

> The presiding officer shall rule on the admissibility of all evidence. Evidence to which an objection is sustained, at the request of the party seeking to introduce the same or at the instance of the commission, nevertheless may be heard and preserved in the record, together with any cross-examination with respect to the evidence and any rebuttal of the evidence, unless it is wholly irrelevant, repetitious, privileged or unduly long. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings shall be unnecessary and need not be taken.

they can provide testimony on the Applicant's credit-worthiness.

(6) Witnesses from Aquila that were to provide testimony solely on the issue of the anonymous communications are released and do not have to appear before the Commission.

5. No motions for reconsideration of this ruling were filed with the Commission.

3. Conclusions of Law Regarding the Evidentiary Ruling

Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue.[16] Even if logically relevant, the finder of fact has discretion to limit such evidence, or exclude it all together, if the fact-finder believes the evidence is not legally relevant.[17] Legal relevance refers to the probative value of the purported evidence outweighing its risks of unfair prejudice, confusion of issues, delay, waste of time, or cumulativeness.[18] Consequently, even logically relevant evidence may be excluded unless its benefits outweigh its costs.[19]

A determination of relevancy is often subjective and the fact-finder is granted broad discretion in determining the relevance of evidence.[20] The fact-finder is granted discretion because of concerns about prejudice, confusion of the issues, and interrogation that is only marginally relevant.[21] The fact-finder's wide discretion extends to the determination of the admissibility of evidence on collateral matters.[22]

[16] *State v. Liles*, 237 S.W.3d 636, 638-639 (Mo. App. 2007); *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005); *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004); *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654-655 (Mo. App. 1997); *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo. App. 1995) (quoting *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. App. 1992)).

[17] *Liles*, 237 S.W.3d at 638-639.

[18] *Id.*

[19] *Id.* Even when evidence is relevant, it is within the discretion of the fact-finder to exclude the evidence if its probative value is outweighed by its prejudicial effect. *Stevinson v. Deffenbaugh Industries, Inc*., 870 S.W.2d 851, 860 (Mo. App. 1993).

[20] *Cohen v. Cohen*, 178 S.W.3d 656, 664 (Mo. App. 2005); *Stevinson v. Deffenbaugh Industries, Inc*., 870 S.W.2d 851, 860 (Mo. App. 1993).

[21] *Liles*, 237 S.W.3d at 638 -639.

[22] *Midwest Materials Co. v. Village Development Co*., 806 S.W.2d 477, 495 (Mo. App. 1991); *Boehmer v. Boggiano,* 412 S.W.2d 103, 110 (Mo. 1967); *Barrett v. Flynn,* 728 S.W.2d 288, 293 (Mo. App. 1987).

The fact-finder's rulings will not be disturbed by an appellate court unless an abuse of discretion is shown.[23] "An abuse of discretion is shown when the trial court's ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."[24]

The Commission notes that at hearing Staff planned to call 15 witnesses on the Iatan construction issues, and 15 witnesses on the anonymous allegations issue.[25] Staff also proposed to inquire into the "Additional Amortizations" issue, as well as the possibility of a future regulatory plan for Aquila, even though Great Plains' Chief Financial Officer Terry Bassham had testified that the additional amortizations issue had been withdrawn from the Applicants' request.[26] Additionally, Staff launched an investigation into the codes of corporate conduct of the Applicants, with particular emphasis on the companies' policies regarding gifts and gratuities apparently out of an interest to determine if there was any merit to the hearsay allegations contained in the anonymous letters directed to the Commission.

a. The Anonymous Letters

The Presiding Officer held that any purported evidence related to the unsolicited and unsigned letters was "wholly irrelevant" to this proceeding and the determination with regard to if the transaction contemplated is not detrimental to the public interest. Being hearsay, and perhaps being even beyond hearsay since no proponent of admitting the purported evidence of the out of court/hearing statements has identified the source of these statements, the statements themselves are incompetent, unsubstantial and cannot be used as the basis of any ruling by this Commission. Moreover, as directed by this state's Supreme Court, conclusions or further speculation about this hearsay does not

[23] *Cohen*, 178 S.W.3d at 664.
[24] *Id*.
[25] See Issues X and XI, Staff's Second List of Issues at 10-11 (EFIS Docket Number 303, filed April 16, 2008); EFIS Docket Number 309, Great Plains Energy's and KCPL's Motion to Limit Scope of the Proceeding to Evidence Relating to Whether the Proposed Acquisition of Aquila by Great Plains Energy, Inc. Is Not Detrimental to the Public Interest, filed April 17, 2000; EFIS Docket Number 318, Staff's Response In Opposition To Great Plains Energy's And KCPL`s Motion To Limit Scope Of The Proceeding To Whether Evidence Relating To Issues II Through IX Of The Second List Of Issues Is Not Detrimental To The Public Interest, filed April 24, 2008; EFIS Docket Number 323, Industrial Intervenors Response to Motion to Limit Scope of the Proceeding, filed April 24, 2008.
[26] See Bassham Add'l Supp. Direct at 4. An Aquila regulatory plan is a potential topic for a future case, but it is not an element of the Applicants' current request. *Id*.

qualify as competent and substantial evidence upon the whole record essential to the validity of a final decision, finding, rule of order of an administrative officer or body under § 22, Article V of the Missouri Constitution.[27] "The rule against hearsay evidence is based on the propriety of the confrontation and the cross-examination of the witness having personal knowledge of the facts adduced, **and his veracity alone**."[28]

Sworn testimony from other witnesses will not cure the fundamental defect of this purported evidence. Even the fact that the technical rules of evidence do not apply in administrative proceedings does not abrogate this **fundamental** rule of evidence.[29] In fact, soliciting comment or speculation from other individuals regarding these hearsay statements invites double hearsay, speculation and additional statements that cannot be substantiated. Indeed two of the anonymous letters already involve instances of double hearsay. This merely magnifies the evidentiary incompetence of this entire line of investigation – especially when no such speculative inquiry is required.

The Applicants filed their initial merger request over one year ago on April 4, 2007. The parties have had more than sufficient time, through discovery and other procedural devises, to develop and present actual competent evidence on the exact same subject matter as encompassed within the anonymous communications. The Commission has heard testimony from multiple subject matter experts, presented by multiple parties, regarding the proposed transactions. The parties in opposition to Applicant's motion seem to have overlooked the fact that volumes of competent evidence were appropriately offered into the record addressing the very same subject matter of the anonymous letters, i.e., the Applicant's financial ability to effectuate the proposed merger. Indeed many of these witnesses were the same witnesses that Staff had listed to provide testimony about the anonymous letters. Having sworn competent testimony in the record is certainly superior to any hearsay letters or testimony surrounding them. Even if some minuscule piece of relevant evidence is buried in this incompetent evidence, given the facts that the same witnesses Staff seeks to examine with regard to the anonymous letters already provided

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[27] *State ex rel. De Weese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949); *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 842 (Mo. App. 2004);
[28] *De Weese*, 221 S.W.2d at 209.
[29] *Id*. See also State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 154-156 (Mo. banc 2003).

competent evidence on the same subject matter, then any ferreting out of this information would merely be repetitive – another reason for denying the offer of proof.

The Commission has indeed faced this identical issue before. In KCPL's application for authority to issue certain debt securities, Case No. EF-2008-0214, Praxair, Inc., sought to have the Commission address an anonymous letter when making its decision.[30] The Commission concluded that: "Given that this case constitutes a contested case under § 536.010(4) RSMo 2000, the Commission declines to consider the letter in question. An anonymous letter not supported by a sworn witness who is subjected to cross-examination constitutes mere hearsay and should not be considered by the Commission in reaching a decision in a contested case."[31] Moreover, the Commission has had its decisions overturned for ignoring this basic precept of law and it declines to err again at the bequest of any party in this matter.[32]

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[30] See *Application of Kansas City Power & Light Company for Authority to Issue Debt Securities*, Order Approving Financing, Case No. EF-2008-0214, issued February 14, 2008.
[31] *Id*.
[32] The Western District Court of Appeals opined:

> Cases are legion that hearsay evidence does not rise to the level of competent and substantial evidence within the ambit of Mo. Const. Art. V, § 18. *State ex rel. DeWeese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949); *Dickinson v. Lueckenhoff*, 598 S.W.2d 560, 561-62 (Mo. App. 1980); *Wilson v. Labor and Indus. Relations Comm'n*, 573 S.W.2d 118, 120-21 (Mo. App. 1978); *Bartholomew v. Bd. of Zoning Adjustment*, 307 S.W.2d 730, 733 (Mo. App. 1957); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763 (Mo. App. 1955); and *Dittmeier v. Missouri Real Estate Comm'n*, 237 S.W.2d 201, 206 (Mo. App. 1951). Laclede and the Commission seek to avoid the fatal consequence of the evidentiary deficiency by the classic hue and cry of virtually limitless discretion possessed by the Commission, the admonition that courts should not substitute their judgment for that of the Commission, and the indulgence of deference for decisions of the Commission because of its expertise in the complicated and highly sophisticated matters it is legislatively ordained to resolve. Judicial recognition thereof when and where appropriate, however, does not dictate blind acceptance of every order cut and every decision handed down by the Commission. Indiscriminate approval of orders and decisions of the Commission, without subjecting them to the rigors of Mo. Const. Art. V, § 18, is an abdication of judicial responsibility. Unbridled bureaucracy is the subtle destroyer of people's rights and Mo. Const. Art. V, § 18, is their response. Having concluded that there was no "competent and substantial evidence" upon the whole record to support a finding by the Commission that 34 degrees Fahrenheit was a mean or average

Under the relevance standard, the anonymous letters and the testimony about those letters just summarized, are clearly irrelevant and were properly excluded. This purported evidence tends neither to prove nor disprove any fact in issue and does not corroborate any other relevant evidence bearing on the principal issues before the Commission. If the excluded evidence does not tend to prove or disprove a fact in issue or corroborate other relevant evidence which bears on the principal issue, then a Commission decision made in the absence of such evidence does not render the Commission's decision arbitrary, capricious, unreasonable or an abuse of discretion.[33]

With regard to denying the offer of proof on this purported evidence, finding that this purported evidence is wholly irrelevant and repetitious to valid and competent testimony eliminates the requirement for an offer of proof.[34] Further, it is not a due process violation to exclude an offer of proof when purported evidence that a party wishes to offer is wholly irrelevant, repetitious, privileged, or unduly long.[35]

Finally, Staff and the Industrials claim there is plenty of time to hear this wholly irrelevant evidence, or at least an offer of proof with regard to its purported relevancy. This assertion ignores the fact that these proceedings have already dragged on for over a year and that there is a clock ticking between the Applicants with regard to when the proposed transaction will expire. The Commission has literally thousands of pages in this record composed of pleadings and filings, prefiled testimony and hearing transcripts, and of relevant statutes and Commission Rules that it must review in order to reach a decision in this matter, consuming another two days on wholly irrelevant matters causes the Commission to conclude that two-days to hear irrelevant testimony on incompetent hearsay or hear an offer of proof would indeed be unduly long.

> temperature "balance" or "changeover" point at which electric add-on heat pumps cease to be operational, the surcharge tariff sought by Laclede and approved by the Commission falls apart for want of a linch-pin. Perforce, the Circuit Court of Cole County was eminently justified when it invalidated the surcharge tariff on the ground heretofore discussed.

State ex rel. Marco Sales, Inc. v. Public Service Com'n, 685 S.W.2d 216, 220-221 (Mo. App. 1984).

[33] *Kendrick*, 945 S.W.2d at 654-655.

[34] See Section 536.070(7) and Commission Rule 4 CSR-240-2.130(3).

[35] *Roorda v. City of Arnold*, 142 S.W.3d 786, 797 (Mo. App. 2004).

Consequently, while the Commission only addressed the “wholly irrelevant” status of this purported evidence at hearing, upon further examination, the Commission further finds that to the extent even a small kernel of relevant evidence could be buried in this irrelevancy, allowing the introduction of this evidence would also have been repetitive and caused undue delay.

b. Great Plains and KCPL’s Code of Ethical Business Conduct and Their Gift and Gratuity Policy

As Great Plains and KCPL correctly point out, the Applicants’ code of ethical business conduct and their gift and gratuity policies, and Staff's inquiries regarding them have no bearing on whether Great Plains' acquisition of Aquila is not detrimental to the public interest. Such questions, prompted only by the anonymous letters filed at the Commission that contain no specific accusations of misconduct or bribery against any person or entity, have brought Staff close to second-guessing management in its operation of these companies. The Commission, of course, is not permitted "to dictate the manner in which the company shall conduct its business."[36] As the Court of Appeals succinctly stated in *State ex rel. Harline v. Public Service Commission of Mo*: [37]

> 6. The powers of regulation delegated to the Commission are comprehensive . . . . Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare.[38]

As noted, the source for the purported evidence upon the business ethics and gratuities inquiry is also the anonymous letters. Not only is the source incompetent with regard to evidentiary quality, but it involves a wholly irrelevant matter over which the Commission lacks

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[36] *State ex rel. Kansas City Transit, Inc. v. PSC*, 406 S.W.2d 5, 11 (Mo. 1966); *State ex rel. PSC v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. 1995).

[37] *State ex rel. Harline v. Public Service Commission of Mo.*, 343 S.W.2d 177, 181-182 (Mo. App. 1960).

[38] *Harline*, 343 S.W.2d at 181 -182. See also *State ex rel. City of St. Joseph v. Public Service Commission*, 325 Mo. 209, 30 S.W.2d 8 (Mo. banc 1930). Also, see *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981.

jurisdiction.[39] Continuing such inquiry at the hearing would sidetrack the Commission from the questions that must be properly explored and the weighing of benefits and detriments relevant to whether the acquisition should be approved. This evidence was appropriately excluded as being wholly irrelevant and no offer of proof is required or warranted.

c. The Future "Additional Amortizations" Issue

While the future additional amortizations issue was raised by Great Plains and KCPL in their motion to limit the scope of the proceedings, it was also the subject of a separate motion from the Industrial Intervenors that was still pending before the Commission at the resumption of the evidentiary hearing in April 2008. On December 5, 2007, the Industrials had filed a motion for partial summary judgment with regard to the Applicants now-discarded request to have the Commission consider a regulatory plan involving Additional Amortizations. The Industrial's reasoning was that absent an agreement of the parties, such regulatory methodology is prohibited by Section 393.135. This argument has been repeated over and over throughout this case in various contexts despite the fact that the Applicants removed their request for a regulatory plan that included Additional Amortizations from their merger application. The Industrials, Public Counsel, and Staff have all attempted to use the Missouri Supreme Court ruling in *AG Processing*[40] to bootstrap the argument that the Commission must rule on this issue now, even though there is no plan for Additional Amortizations before the Commission.

Even assuming *AG Processing* applied, the argument fails. Furthermore, this is not the same situation as *AG Processing*. To break it down, the decision in *AG Processing* was a narrow holding, requiring

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[39] Even in cases involving the prudence of a utility's expenditures, there is a presumption that the utility's costs are prudently incurred. "In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that '[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." *City of St. Joseph*, 30 S.W.2d at 14.'" *In the Matter of Missouri-American Water Company's Tariff Sheets*, Report and Order, Case No. WR-2000-281 (August 31, 2000).

[40] *State ex rel. AG Processing, Inc. v. Public Service Com'n of State*, 120 S.W.3d 732, 735-736 (Mo. banc 2003).

the Commission to consider a known, quantified acquisition premium that was entered into evidence in a merger case. The Commission had maintained that "considering recoupment of the $92,000,000 acquisition premium while considering approval of the merger amounts to prejudging a ratemaking factor outside a ratemaking case."[41] The court held:

> 7. The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.[42]

6. The Supreme Court did not hold that the Commission in a pending case must consider every piece of speculative, non-existent evidence that might appear in a future case where such evidence, if it existed, might somehow be relevant.

Regardless, putting the *AG Processing* argument aside for a moment, Section 393.315, entitled "Charges based on nonoperational property of electrical corporation prohibited," provides:

> 8. Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully

[41] *Id*.
[42] *Id*.

> operational and used for service, is unjust and unreasonable, and is prohibited.

The Industrials, Public Counsel, and Staff argue that a regulatory plan allowing for Additional Amortizations would fall under the umbrella of this statute, and as such the Commission could not independently approve such a plan. The parties further argue that the Commission does have the authority, however, to approve such a plan by means of approving a unanimous stipulation and agreement containing such a plan.

However, there is no stipulation and agreement submitted by the parties in this action. How could the Commission possibly make a prospective determination about an unfilled stipulation and agreement and its unknown terms and conditions? Especially when there is no guaranty that such a stipulation and agreement would even be filed; no guaranty the parties would agree to a unanimous stipulation and agreement; and no guaranty the company would even seek this relief.

Simply put, even if one accepted the *AG Processing* argument, which the Commission believes is incorrect, there is no way possible for this to be a live issue before the Commission. No plan is filed. Moreover, no stipulation and agreement is filed so there is nothing else for the Commission to review or consider at this time. *AG Processing* does not require the Commission to rule on a nonexistent issue. And, similar to the appellate courts in our state, the Commission does not decide hypothetical or nonexistent issues, and will not render an advisory opinion where there is no case in controversy.[43]

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[43] See *Warren v. Warren*, 601 S.W.2d 683, 687 (Mo. App. 1980); Order Partially Dismissing Application for Failure to State a Claim, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266, 2007 WL 923935 (Mo. P.S.C.) Issued March 20, 2007, Effective March 30, 2007; Order Denying Motion to Open Case, *In the Matter of the Necessity of Approval of Transiting Services Agreements Under Section 252 of the Telecommunications Act of 1996 and Related Issues*, Case No. TO-2005-0407 (Jun. 7, 2005). See also *State ex rel. County of Jackson v. Missouri Pub. Serv. Comm'n*, 985 S.W.2d 400, 403 (Mo. App. 1999) (declining to review issues raised by respondent "in terms of all future cases" since that was "effectively a request for an advisory opinion on hypothetical questions"); *State ex rel. Missouri Cable Television Ass'n v. Missouri Pub. Serv. Comm'n*, 917 S.W.2d 650, 652 (Mo. App. 1996) (dismissing appeal because there was no live controversy, but "[o]nly a hypothetical question for which appellant seeks an advisory opinion.")

While the evidentiary ruling found this issue to be irrelevant, it did not find it to be wholly irrelevant and the Commission received an offer of proof on this evidence.[44]

d. The Inquiry into KCPL's Comprehensive Energy Plan

With regard to the extensive inquiry into to KCPL's CEP**,**[45] including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects, Great Plains and KCPL argued that bringing this evidence into the record would be overly broad and requested that the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains' acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.

It should be noted that the basis for Staff's request of an expansive inquiry into the CEP was based upon the anonymous hearsay letters. Also, Staff only referenced the Iatan projects in relation to the CEP in its response to the motion. This issue became expansive only when it was filed in the issues list – a list not adopted by the Commission, and a list the parties agreed was non-binding.

Great Plains and KCPL simply requested that the scope of this evidence be restricted to that which was relevant. They offered to provide all testimony with relation to these construction programs, in relation to procurement and synergies, and in relation to the company's credit-worthiness. In fact, the Commission heard from numerous subject matter experts on these issues and heard virtually two days worth of testimony on the issue of the company's credit-worthiness and the company's ability to manage its construction programs – indeed, from the very same witnesses Staff intended to present on these issues.[46] The expansion of the scope of this testimony would not only bring irrelevant evidence into the record, but would be repetitive to the evidence already adduced.

[44] Transcript, pp. 2946-3027.

[45] As previously noted, the CEP is set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329.

[46] It should be noted that the evidentiary ruling did not release any of the witnesses that Great Plains and KCPL requested to be released so that those witnesses could still be examined on the relevant issues.

E. Court of Appeals – Petition for a Writ of Mandamus and Writ of Prohibition

On May 1, the Industrial Intervenors filed a petition for a writ of mandamus and a writ of prohibition with the Court of Appeals alleging that the Presiding Officer's evidentiary ruling to limit the scope of these proceedings was "arbitrary" and "an abuse of discretion exercised with manifest injustice."[47] The Court of Appeals took up the writ application expeditiously pursuant to the Industrial Intervenors' request for expedited treatment.[48] The Court of Appeals denied the petition summarily without requiring any response from the Commission.[49]

F. Missouri Supreme Court – Petition for a Writ of Mandamus and Writ of Prohibition

On May 7, the Industrial Intervenors filed a petition for a writ of mandamus and a writ of prohibition with the Missouri Supreme Court raising the same allegations that were made in their writ application with the Court of Appeals; i.e., that the Presiding Officer's evidentiary ruling to limit the scope of these proceedings was "arbitrary" and "an abuse of discretion exercised with manifest injustice."[50] That same day the Court directed the Commission to file Suggestions in Opposition to the writ application no later than May 16. Suggestions were filed by both the Commission and Great Plains. On June 24, the Court issued its decision denying the Writ Petition without opinion.[51]

G. Petition to Reopen the Record

On May 30, the Industrial Intervenors filed a petition to reopen the record for the taking of additional evidence. The Industrial Intervenors specifically claimed that a crane accident occurring at the Iatan 2 construction site could have jeopardized KCPL's ability to manage its current construction projects while at the same time consummate the planned merger. The Commission reopened the record

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[47] *State of Missouri ex rel. Praxair Inc., Sedalia Industrial Energy Users' Association and Ag Processing, Inc. a Cooperative v. Public Service Commission of the State of Missouri, a State Agency, and Its Members Jeff Davis, Connie Murray, Robert Clayton, II, Terry Jarrett, and Kevin Gunn, in Their Official Capacity*, Suggestions in Support of Petition for Writ of Mandamus and Writ of Prohibition, Case No. WD69611, filed May 1, 2008, denied May 2, 2008.

[48] *Id*. at Docket Entry May 2, 2008.

[49] *Id*.

[50] *State of Missouri ex rel. Praxair Inc., Sedalia Industrial Energy Users' Association and Ag Processing, Inc. a Cooperative v. Public Service Commission of the State of Missouri, a State Agency, et al.* Supreme Court Case Number SC89289, filed May 7, 2008.

[51] *Id*. at Docket Entry June 24, 2008.

and received additional testimony and arguments on June 11, regarding the effect of the crane accident on the credit-worthiness of the Applicants.[52]

The Commission heard testimony from Terry Bassham, KCPL's Chief Financial Officer ("CFO") and Great Plains' Vice-President of Finance and CFO; Brent Davis, KCPL's Project Manager at Iatan I; and Michael Cline, KCPL's Treasurer and Risk Officer. The Commission allowed for oral argument in this singular issue in lieu of additional briefing.

H. Case Submission

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing resumed on April 21 through May 1 and finally concluded on June 11, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of 34 witnesses and received some 140 exhibits into evidence.

Post-hearing briefs and proposed findings of fact and conclusions of law were filed according to the post-hearing procedural schedule as revised. The post-hearing briefs were filed on June 2[53] and oral arguments regarding the crane accident issue were heard at the close of the hearing on June 11.[54] The case was deemed submitted for the Commission's decision on that date.[55]

9. <u>II. Findings of Fact</u>

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not

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[52] Transcript, pp. 3142-3230.

[53] With the exception of Staff's brief which was filed out-of-time with leave of the Commission.

[54] The Commission admitted all late-filed exhibits on June 10, 2008, after allowing sufficient response time for objections to their late-filing or late-offering. See EFIS Docket Number 474, *Order Admitting Late-Filed and Late-Offered Exhibits*. That same order allowed the parties until June 13, 2008 to amend their post-hearing briefs in relation to those exhibits, in the event that the parties had failed to rely on any of the exhibits when their briefs were originally filed.

[55] "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.[56] Section 536.090 provides, in pertinent part:

> 10. Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.[57] Nonetheless, the following formulation is often cited:

> 11. The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.[58]

7. Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."[59] Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."[60]

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's

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[56] *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n,* 103 S.W.3d 813, 816 (Mo. App. 2003); St. *ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n,* 24 S.W.3d 243, 245 (Mo. App. 2000).

[57] *Glasnapp v. State Banking Bd.,* 545 S.W.2d 382, 387 (Mo. App. 1976).

[58] *Id.* (*quoting* 2 Am.Jur.2d *Administrative Law* § 455, at 268).

[59] *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n,* 806 S.W.2d 680, 684 (Mo. App. 1991) (*quoting St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n,* 701 S.W.2d 745, 754 (Mo. App. 1985)).

[60] *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (*relying on St. ex rel. Rice v. Pub. Serv. Comm'n,* 359 Mo. 109, 220 S.W.2d 61 (1949)).

discretion,[61] but witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."[62] An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.[63]

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.[64] And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.[65] Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.[66]

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[61] *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.,* 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh,* 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

[62] *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl,* 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel,* 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell,* 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark,* 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc*., 782 S.W.2d 170, 173 (Mo. App. 1990).

[63] *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); In the Interest of A.H., 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of the State of Mo.*, 37 S.W.3d 287(Mo. App. 2000); *State ex rel. Midwest Gas Users' Ass'n. v. Public Service Com'n of the State of Mo.*, 976 S.W.2d 485(Mo. App. 1998); *State ex rel. Conner v. Public Service Com'n*, 703 S.W.2d 577 (Mo. App. 1986).

[64] *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA,* 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus,* 478 F.Supp. 125, 131 (D.C.Cir.1979).

[65] *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness,* 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

[66] *Id*.

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.[67] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.[68] Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.[69]

A. Findings of Fact Regarding the Parties

8. Great Plains Energy Incorporated ("Great Plains" or "GPE"), located at 1201 Walnut, Kansas City, Missouri, is a Missouri corporation and the holding company for Kansas City Power & Light Company, and for Strategic Energy, L.L.C., a competitive electricity supplier located in Pittsburgh, Pennsylvania.[70] Great Plains was established on October 1, 2001, and its stock is traded on the New York Stock Exchange ("NYSE") as "GXP."[71] Great Plains is a public utility holding company regulated under the Public Utility Holding Company Act of 2005, which was enacted as part of the Energy Policy Act of 2005.[72] As a holding company, Great Plains does not provide electric service to retail customers.[73]

9. Kansas City Power & Light Company ("KCPL"), located at 1201 Walnut, Kansas City, Missouri, is a corporation duly organized and existing under the laws of the State of Missouri.[74] KCPL is engaged in the generation, transmission, distribution, and sale of electric energy.[75] KCPL distributes and sells electric service to the public in its certificated

[67] *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).
[68] *Id*.
[69] *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).
[70] Joint Application of Great Plains Energy Incorporated, Kansas City Power and Light Company and Aquila, Inc., filed April 4, 2007, pp. 1-2, paragraph 1.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] Joint Application of Great Plains Energy Incorporated, Kansas City Power and Light Company and Aquila, Inc., filed April 4, 2007, p. 2, paragraph 2.
[75] *Id*.

areas in Missouri and Kansas.[76] KCPL serves approximately 500,000 customers.[77] Its service territory is comprised of 11,710 distribution primary circuit miles over 4,600 square miles.[78]

10. Aquila, Inc. ("Aquila") is a Delaware corporation, with its principal office and place of business at 20 West Ninth Street, Kansas City, Missouri.[79] Aquila was established in 1985, and its stock is traded on the NYSE as "ILA".[80] Aquila is authorized to conduct business in Missouri through its Aquila Networks-MPS and Aquila Networks-L&P operating divisions and, as such, is engaged in providing electric and steam utility service in Missouri to the public in its certificated areas.[81] Aquila also has regulated energy operations in Colorado, Iowa, Nebraska and Kansas.[82]

11. Aquila and KCPL are co-owners, with certain other parties, of the coal-fired Iatan 1 generating plant ("Iatan 1") located at the Iatan Generating Station in Platte County, Missouri.[83] Aquila and KCPL are also co-owners, with certain other parties, of the coal-fired Iatan 2

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[76] *Id*.
[77] GPE/KCPL Exh. 16, Herdegen Direct, p. 2.
William P. Herdegen, III is employed by KCPL as Vice President of Customer Operations. He is responsible for the engineering, design, construction, maintenance, and operation of KCPL's distribution system, as well as the call center and revenue management. His role includes the recent assignment as lead of the delivery transition teams, responsible for the integration of Aquila with Great Plains. He graduated from the University of Illinois, Champaign-Urbana in 1976 with a Bachelor of Science degree in Electrical Engineering, and in 1981, he received M.B.A. from The University of Chicago. He was first employed at KCPL in 2001. He has nearly 30 years of experience in the electric utility industry. Prior to joining KCPL, he served as chief operating officer for Laramore, Douglass and Popham, a consulting firm providing engineering services to the electric utility industry. Additionally, he was vice president of Utility Practice at System Development Integration, an IT consulting firm focused on development and implementation of technology systems. He began his utility career at Commonwealth Edison and over a course of more than 20 years held various positions, including field engineer, district manager, business unit supply manager, operations manager and vice president - Engineering, Construction & Maintenance. He has previously testified before both the Missouri Public Service Commission and the Kansas Corporation Commission.
[78] *Id*.
[79] Joint Application of Great Plains Energy Incorporated, Kansas City Power and Light Company and Aquila, Inc., filed April 4, 2007, pp. 2-3, paragraph 3.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*. at paragraph 4.

generating plant ("Iatan 2"), which is now under construction at the Iatan Generating Station.[84]

12. Black Hills Corporation ("Black Hills") is a South Dakota corporation, with its principle office and place of business located at 625 Ninth Street, Rapid City, South Dakota, which owns both regulated and non-regulated businesses.[85] Its regulated gas and electric utility subsidiaries are Black Hills Power, Inc., an electric utility serving western South Dakota, northeastern Wyoming and southeastern Montana, and Cheyenne Light, Fuel & Power Co., an electric and gas distribution utility serving the Cheyenne, Wyoming area.[86] The wholesale energy business unit of Black Hills is Black Hills Energy, Inc., which generates electricity, markets energy, and produces natural gas, oil and coal.[87] In addition to its electric and gas utility service businesses and wholesale energy production and marketing business, Black Hills Services Company, Inc., a wholly-owned subsidiary of Black Hills, provides centralized services to the Black Hills system.[88]

13. Missouri Joint Municipal Electric Utility Commission ("MJMEUC") is a political subdivision of the State of Missouri, organized and existing as a joint municipal utility commission pursuant to Section 393.700, et seq.[89] The MJMEUC is not an "association," but rather a political subdivision of the State of Missouri pursuant to Section 393.720.[90] Fifty-eight Missouri municipalities currently are parties to the joint contract establishing the MJMEUC.[91] MJMEUC is a wholesale energy and transmission customer of KCPL, both directly and on behalf of its contracting municipalities.[92] The MJMEUC and some of its contracting municipalities also receive transmission service from Aquila, Inc.[93] The MJMEUC also has a partial ownership interest in the Iatan 2 generating facility.[94]

14. Ag Processing, Inc. ("AGP") is an agricultural cooperative and is a large manufacturer and processor of soybean meal,

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[84] *Id*.
[85] Application to Intervene of Black Hills, pp. 1-2, filed April 27, 2007.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] Application to Intervene of MJMEUC, p. 1, paragraphs 1, filed April 27, 2007.
[90] *Id*. at p. 2, paragraph 3.
[91] *Id*. at p. 1, paragraph 1.
[92] *Id*. at p. 2, paragraph 4.
[93] *Id*.
[94] *Id*. at p. 2, paragraph 3.

soy-related food products, and other grain products throughout the central and upper Midwest, including the State of Missouri.[95] AGP is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States, and the third-largest commercial feed manufacturer in North America.[96] AGP operates a major processing facility in St. Joseph, Missouri, where it is a major industrial electrical and steam customer of Aquila in the L&P service territory.[97]

15. Sedalia Industrial Energy Users' Association ("SIEUA") is an unincorporated voluntary association consisting of large commercial and industrial users of natural gas and electricity in the city of Sedalia, Missouri and in the surrounding area.[98] SIEUA was formed for the purpose of economical representation of its members' interests through intervention and other activities in regulatory and other appropriate proceedings, and in combination its members are major consumers of Aquila's electric service.[99]

16. Praxair, Inc. ("Praxair") is a large industrial electric customer of KCPL, operates a major air liquefaction and constituent gas separation facility in Kansas City, Missouri, and is the successor in interest to the Linde Division of Union Carbide Corporation.[100]

17. Dogwood Energy, L.L.C. ("Dogwood") is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri.[101] Dogwood owns a 600 MW combined cycle generating facility located within Aquila's MPS service territory and is a potential provider of capacity and energy to Aquila.[102]

18. The International Brotherhood of Electrical Workers, Local Unions Nos. 412, 695, 814, 1613, and 1464 ("IBEW" or "Locals") are voluntary organizations doing business and representing employees

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[95] Application to Intervene of AGP, p. 1, paragraphs 1, filed April 11, 2007.
[96] *Id*.
[97] *Id*. at p. 2, paragraph 2.
[98] Application to Intervene of SIEUA, p. 1, paragraph 1, filed April 11, 2007. Current members of SIEUA are as follows: Pittsburgh Corning Corporation; Waterloo Industries; Hayes-Lemmerz International; EnerSys Inc.; Alcan Cable Co.; Gardner Denver Corporation; American Compressed Steel Corporation; and ThyssenKrupp Stahl Company. *Id*. at p. 2, paragraph 2.
[99] *Id*. at p. 1, paragraph 1, p. 3-4, paragraph 6.
[100] Application to Intervene of Praxair, Inc., p. 1, paragraph 2, p. 2, paragraph 5, filed April 11, 2007.
[101] Application to Intervene of Dogwood, p. 1, paragraph 1, filed April 27, 2007.
[102] *Id*. at p. 2, paragraph 4.

in the State of Missouri.[103] The Locals are also labor organizations as defined in the National Labor Relations Act, as amended, 29 U.S.C. § 152, et seq.[104] Locals 412, 1464, and 1613 have separate collective bargaining agreements with Kansas City Power & Light Company and represent certain employees of KCPL.[105] Locals 695 and 814 represent employees employed by Aquila, Inc., d/b/a Aquila Networks-WPK.[106]

19. Frank Dillon, Kimberly Miller, James E. Doll, Randy Cooper, Gary Crabtree, Eric Thompson, and Allen Bockelman (collectively, the "South Harper Residents") are individuals each of whom has pending civil court claims against Aquila alleging loss in property values related to the construction and operation of Aquila's South Harper Project facilities.[107]

20. Cass County is a First Class County of the State of Missouri under the county classification provisions of Chapter 48, RSMo 2000, and is a political subdivision of the state with powers, duties and obligations as provided by law.[108] Aquila operates an electrical power production facility and an associated electric transmission substation located on tracts of property in unincorporated Cass County, Missouri, frequently referred to as the South Harper Facility and Peculiar Substation.[109]

21. The City of Kansas City, Missouri ("Kansas City") is a municipality of the State of Missouri and is a large consumer of energy supplied by Aquila and KCPL.[110]

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[103] Application to Intervene of IBEW, Locals 412, 1464 and 1613, p. 1, paragraph 1, p. 2, paragraph 6, filed April 24, 2007; Application to Intervene of IBEW, Locals 695, and 814, p. 1, paragraph 1, p. 2, paragraph 6, filed April 30, 2007.
[104] *Id*.
[105] Application to Intervene of IBEW, Locals 412, 1464 and 1613, p. 1, paragraph 1, p. 2, paragraph 6.
[106] Application to Intervene of IBEW, Locals 695 and 814, p. 1, paragraph 1, p. 2, paragraph 6.
[107] Application to Intervene of South Harper Residents, p. 1, paragraph 1, p. 2, paragraph 2, filed April 30, 2007. Frank Dillon, Kimberly Miller, James E. Doll, Randy Cooper, Gary Crabtree, and Eric Thompson each reside on property adjacent to or in very close proximity to an electrical peaking facility (commonly known as the "South Harper Facility" or the "South Harper Power Plant"). Allen Bockelman resides on property adjacent to a related electric substation (commonly known as the "Peculiar Substation"). *Id*.
[108] Application to Intervene of Cass County, p. 1, paragraph 1, filed April 27, 2007.
[109] *Id*. at p. 2, paragraph 4.
[110] Application to Intervene of Kansas City, p. 1, paragraph 1, p. 2, paragraph 4, filed April 18, 2007.

22. The City of St. Joseph, Missouri ("St. Joseph") is a municipality of the State of Missouri located in Buchanan County and is a large consumer of energy supplied by Aquila.[111]

23. The City of Independence, Missouri ("Independence") owns and operates a municipal electric utility serving more than 55,000 customers, and acquires much of the power and energy needed to meet its customers' demand through direct physical interconnections with both KCPL and Aquila.[112] These arrangements include purchases of a portion of the capacity and energy from Montrose, a large, base load, coal-fired unit owned by KCPL.[113] The City is also a retail customer of KCPL, with KCPL providing retail electric service to the City's water treatment plant.[114] KCPL also provides electric service to one large retail customer located within the City (the Lake City Army Ammunitions Plant), and KCPL has a franchise from the City allowing and governing KCPL's service to this customer.[115]

24. The City of Lee's Summit ("Lee's Summit") is a constitutional charter city pursuant to Chapter 82 of RSMo and Article VI, Section 19 of the Missouri Constitution and is a political subdivision and municipal corporation of the State of Missouri.[116] Aquila supplies electricity to Lee's Summit and to residential, commercial and industrial customers located within the corporate limits of Lee's Summit.[117]

25. The United States Department of Energy ("DOE"), National Nuclear Security Administration ("NNSA"), and all other affected Federal Executive Agencies ("FEA") intervened late is this proceeding.[118] DOE/NNSA is a large industrial electric customer of KCPL consuming

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[111] Application to Intervene of St. Joseph, p. 1, paragraph 1, p. 2, paragraph 2, filed April 27, 2007.

[112] Application to Intervene of Independence, p. 1, paragraph 1, p. 2, paragraphs 2 and 3, filed April 30, 2007.

[113] *Id*. at p. 2 paragraph 4.

[114] *Id*.

[115] *Id*.

[116] Application to Intervene of Lee's Summit, p. 1, paragraph 1, filed April 30, 2007. Robert Handley, City Attorney for Lee's Summit filed the City's application to intervene; however, no attorney entered an appearance for the City during either prehearing conference or during the evidentiary hearing. The City did not participate in this matter beyond their application to intervene. The City adduced no evidence, and did not file any briefs stating a position on any issue in this case. Consequently, the City of Lee's Summit is subject to dismissal pursuant to 4 CSR 240-2.116.

[117] *Id*. at, p. 2, paragraph 4.

[118] Petition for Leave to Appear *Pro Hac Vice* of Paul N. Jones and Lewis O. Campbell and Application for Late Intervention of United States Department of Energy, National Nuclear Security Administration and Federal Executive Agencies, filed July 13, 2007.

approximately 156,000 MWhs of electric power annually at an annual cost of approximately $5.9 million.[119] NNSA is a separately organized agency of the DOE created by the National Nuclear Security Administration Act, National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, div. C, title XXXII, Sec. 3211, et seq., Oct. 5, 1999, 113 Stat. 957, codified in Title 50 U.S.C., Section 2401, et seq. and other various titles.[120] DOE/NNSA is authorized by a grant of Delegation of Authority from the General Services Administration pursuant to Section 201(a)(4) of the Federal Property and Administrative Services Act of 1948, as amended (49 U.S.C. 481(a)(4)) to represent customer interests of affected executive agencies of the federal government.[121] FEA represents all federal executive agencies located in KCPL's and Aquila's service territories that purchase electricity from KCPL and Aquila.[122]

26. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."[123] Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."[124]

27. The General Counsel of the Missouri Public Service Commission "represent[s] and appear[s] for the commission in all actions

[119] *Id*. at p. 3, paragraph 10.
[120] *Id*. at p. 2, paragraph 7.
[121] *Id*. at p. 3, paragraph 12.
[122] *Id*. at p. 3, paragraph 11. Attorney's Paul N. Jones and Lewis O. Campbell were granted leave to appear *pro hac vice*, for the United States Department of Energy, National Nuclear Security Administration, and the Federal Executive Agencies on July 27, 2007. However, no attorney entered an appearance for DOE/NNSA/FEA at the two pre-hearing conferences held in this matter or at the evidentiary hearing. These parties did not participate in this matter once intervention was granted. They adduced no evidence, and did not file any briefs stating a position on any issue in this case. Consequently, DOE/NNSA is subject to dismissal pursuant to 4 CSR 240-2.116.
[123] Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2).
[124] Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id*.

and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . ."[125] In this matter the General Counsel represents the position of the Staff of the Missouri Public Service Commission ("Staff").

B. Findings of Fact Regarding Witness Demeanor, Credibility and Testimony

28. The following witnesses prefiled testimony with the Commission pursuant to Commission Rules;[126] i.e. Direct, Supplemental Direct, Additional Supplemental Direct; Rebuttal, Surrebuttal and/or Cross-Surrebuttal:[127]

> Terry Bassham (GPE/KCPL), Kevin E. Bryant (GPE/KCPL), Wallace P. Buran (GPE/KCPL), Lora Cheatum (GPE/KCPL), Michael W. Cline (GPE/KCPL), F. Dana Crawford (GPE/KCPL), William H. Downey (GPE/KCPL), Chris Giles (GPE/KCPL), William P. Herdegen (GPE/KCPL), William J. Kemp (GPE/KCPL), John Marshall(GPE/KCPL), Tim M. Rush (GPE/KCPL), Richard A. Spring (GPE/KCPL), Robert F. Steinke (GPE/KCPL), Charles H. Tickles (GPE/KCPL), Paul Van Dyne (GPE/KCPL), Lori A. Wright (GPE/KCPL), Robert T. Zabors (GPE/KCPL), R. Thomas Fleener (Aquila), Wayne A. Cauthen (KCMO), Robert J. Hix (KCMO), Russell W. Trippensee (Public Counsel), James R. Dittmer (Public Counsel), Robert E. Schallenberg (Staff), Paul N. Mahlberg (Independence), Mark J. Volpe (Independence), Robert Janssen (Dogwood Energy), John E. Grotzinger (MJMEUC) and Maurice Brubaker (AgProcessing/Praxair/SIEUA).

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[125] Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel "if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him." *Id*.

[126] See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

[127] GPE/KCPL Exhs. 1-39; Staff Exh. 100; OPC Exhs. 200-201; Industrial Intervenors' Exh. 300; KCMO Exhs. 400-401; Dogwood Energy Exh. 700; MJMEUC Exh. 800; and Independence Exhs. 1300 and 1305.

29. The following witnesses provided live testimony and were subject to cross-examination by the parties and the Commission:[128]

> Terry Bassham (GPE/KCPL), Kevin E. Bryant (GPE/KCPL), Wallace P. Buran (GPE/KCPL), Wayne A. Cauthen (KCMO), Lora Cheatum (GPE/KCPL), Michael Chesser (GPE/KCPL), Michael W. Cline (GPE/KCPL), F. Dana Crawford (GPE/KCPL), Brent Davis (GPE/KCPL), James R. Dittmer (Public Counsel), William H. Downey (GPE/KCPL), Stephen Easley (GPE/KCPL), Jon Empson (Aquila), R. Thomas Fleener (Aquila), Terry Foster (GPE/KCPL), Chris Giles (GPE/KCPL), Richard Green (Aquila), William P. Herdegen (GPE/KCPL), Robert J. Hix (KCMO), William J. Kemp (GPE/KCPL), John Marshall (GPE/KCPL), James Rose (Aquila), Tim M. Rush (GPE/KCPL), Robert E. Schallenberg (Staff), Max Sherman (Aquila), Robert F. Steinke (GPE/KCPL), Charles H. Tickles (GPE/KCPL), Russell W. Trippensee (Public Counsel), Paul Van Dyne (GPE/KCPL), Lori A. Wright (GPE/KCPL), and Robert T. Zabors (GPE/KCPL).[129]

30. The following witnesses filed prefiled testimony and at the agreement of the parties, cross-examination was waived. These witnesses did not appear before the Commission and provided no live testimony:[130]

> Richard A. Spring (GPE/KCPL), Paul N. Mahlberg (Independence), Mark J. Volpe (Independence), Robert Janssen (Dogwood Energy), John E. Grotzinger (Missouri Joint Municipal Electric Utility Commission - MJMEUC) and Maurice Brubaker (AgProcessing/Praxair/SIEUA).

31. The following witnesses did not prefile any testimony and did not provide any live testimony before the Commission because

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[128] See Transcript Volumes 1-26.

[129] **Michael Chesser** is the Chief Executive Officer and Chairman of the Board for Great Plains Energy. **Brent Davis** is the Iatan 1 Project Director for GPE/KCPL. **Stephen Easley** is the Vice-President of Supply for KCPL. **Jon Empson** is the Senior Vice-President of Regulated Operations for Aquila. **Terry Foster** is the Director of project controls for KCPL. **Richard Green** is the Chief Executive Officer for Aquila. None of these six witnesses prefiled testimony with the Commission and they were called to be witnesses by the Commission's Staff.

[130] See Transcript, p. 1577, lines 4-24; p. 1598, lines 11-19; pp. 1598-1602; p. 2031, lines 15-23;

they were either released directly by the Commission when it made its evidentiary ruling limiting the scope of these proceedings on April 24, or excused by the parties' decisions:[131]

Steve Jones (GPE/KCPL), John Grimwade (GPE/KCPL), Scott Heidtbrink (Aquila), Daryl Uffelman (Aquila) and Lynn Fountain (Aquila).

32. Stanley J. Harris, a witness for Kansas City, prefiled testimony, but on April 8, 2008, Kansas City withdrew him as a witness and withdrew his prefiled testimony from the case.[132] Mr. Harris was not offered as a witness at the hearing and his prefiled testimony was not offered for admission into evidence.

33. The South Harper Residents (i.e., Frank Dillon, Kimberly Miller, James E. Doll, Randy Cooper, Gary Crabtree, and Eric Thompson) did not prefile testimony or provide live testimony.[133] The South Harper Residents offered no evidence into the record and the Commission makes no credibility findings regarding these individuals.

34. Witness R. Thomas Fleener (Aquila) provided testimony on how Aquila reached its decision to transfer its assets.[134]

35. Wayne A. Cauthen (KCMO) and Robert J. Hix (KCMO) provided testimony on the issues concerning municipal franchise agreements between the companies and Kansas City, a potential requirement for the companies to submit a quality of service plan, a potential requirement for the companies to submit an earnings sharing plan, and future rate cases.[135]

36. Paul N. Mahlberg (Independence), Mark J. Volpe (Independence), Robert Janssen (Dogwood Energy), and John E. Grotzinger (MJMEUC) provided rebuttal or surrebuttal testimony on the issues surrounding transmission and RTO/ISO criteria.[136]

37. Witnesses Cauthen, Hix, Mahlberg, Volpe, Janssen and Grotzinger did not oppose the Applicants' merger proposal, but instead offered testimony advocating that certain conditions be placed upon the merger.[137]

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[131] See Transcript, pp. 2073-2118; p. 2402, lines 10-22.
[132] EFIS Docket Number 290, *Correspondence to Judge Dale Withdrawing the Pre-filed Written Testimony of Mr. Stan Harris*, filed April 8, 2008.
[133] See EFIS docket entries for EM-2007-0374.
[134] GPE/KCPL Exh. 14.
[135] KCMO Exhs. 400 and 401.
[136] Independence Exhs. 1300 and 1305; Dogwood Energy Exh. 700; and MJMEUC Exh. 800.
[137] See Footnotes 135 and 136, *supra*, and Transcript, pp. 2132-2200.

38. While on the witness stand, the parties and the Commission waived cross-examination of Russell W. Trippensee (Public Counsel) with regard to his prefiled testimony.[138] Mr. Trippensee did offer live testimony in association with an offer of proof taken on May 1 with regard to the subject matter of regulatory plans involving "Additional Amortizations."[139]

39. Terry Bassham (GPE/KCPL), Kevin E. Bryant (GPE/KCPL), Wallace P. Buran (GPE/KCPL), Lora Cheatum (GPE/KCPL), Michael W. Cline (GPE/KCPL), F. Dana Crawford (GPE/KCPL), William H. Downey (GPE/KCPL), Chris Giles (GPE/KCPL), William P. Herdegen (GPE/KCPL), William J. Kemp (GPE/KCPL), John Marshall (GPE/KCPL), Tim M. Rush (GPE/KCPL), Richard A. Spring (GPE/KCPL), Robert F. Steinke (GPE/KCPL), Charles H. Tickles (GPE/KCPL), Paul Van Dyne (GPE/KCPL), Lori A. Wright (GPE/KCPL), and Robert T. Zabors (GPE/KCPL), all provided extensive prefiled testimony in this matter addressing the merger proposal, purported merger synergies, transaction cost recovery, service quality, the proposed waiver of the Commission's affiliate transactions rule, transmission and RTO/ISO criteria, municipal franchise agreements between the companies and Kansas City, future rate cases, and the companies' credit-worthiness.[140]

40. The Applicants' witnesses provided extensive documentary support with regard to their respective positions on the subject matter of their testimony, via various schedules.[141]

41. Four of Great Plains and KCPL's witnesses, Robert T. Zabors, Wallace P. Buran, William J. Kemp and Robert Steinke were hired as independent consultants versed in the areas of synergy potential/identification and opportunity valuation to provide an additional level of support for the synergy projections and merger value.[142]

42. Great Plains and KCPL filed an additional pleading and prefiled testimony after the revision of their merger proposal to clarify the issues that were present for Commission decision.[143]

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[138] Transcript Volume 21, pp. 2885-2888 (Trippensee).
[139] Transcript Volume 23, pp. 2961-2980.
[140] GPE/KCPL Exhs. 1-13 and 15-39.
[141] *Id*. See Schedules included with testimony.
[142] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[143] See the Commission's Docket Sheet EFIS Numbers 234, 235, 236, and 237; i.e. *Motion for Leave to File Additional Supplemental Direct Testimony and Notice of Withdrawal of Certain Regulatory Plan Requests*, *Additional Supplemental Direct Testimony of Terry*

43. Witnesses Terry Bassham (GPE/KCPL), Michael W. Cline (GPE/KCPL), and Chris Giles (GPE/KCPL) filed Additional Supplemental Direct Testimony following the revision of the merger proposal.[144]

44. With the exception of making minor corrections to their prefiled testimony when taking the witness stand, no other Great Plains and KCPL witness updated, revised, or amended his or her prefiled testimony following the revision of the merger proposal.[145]

45. While on the witness stand, Great Plains and KCPL's witnesses and Aquila's witnesses were composed, confident, sincere, and unwavering in their testimony.

46. While on the witness stand, Great Plains and KCPL's witnesses and Aquila's witnesses were articulate and their live hearing testimony was consistent with their prefiled testimony.

47. The testimony provided by Great Plains and KCPL's witnesses and Aquila witnesses was substantial and credible.

48. Issues that were removed from the case as a result of the revised merger proposal included:[146]

> 1) Aquila Interest Expense: Joint Applicants do not seek to recover in any future general ratemaking proceeding any interest expense in excess of equivalent investment-grade debt that is currently held by Aquila.
>
> 2) Merger Savings: Joint Applicants do not request a specific merger savings sharing mechanism, but rather will rely upon the traditional regulatory ratemaking process so that any merger savings will be passed through to Aquila and KCPL customers in future rate cases.
>
> 3) Regulatory Amortizations: Joint Applicants do not request authority in this proceeding for Aquila to use

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Bassham, *Additional Supplemental Direct Testimony and Schedule of Chris B. Giles* and *Additional Supplemental Direct Testimony and Schedules of Michael W Cline*, all filed February 25, 2008 by Great Plains and KCPL.

[144] *Id*. GPE/KCPL Exhs. 37, 38, and 39.

[145] See EFIS Docket entries for EM-2007-0374.

[146] EFIS Docket Number 386, *Identification of Evidence that is No Longer Relevant to the Joint Application*, filed by Great Plains and KCPL on May 9, 2008, pursuant to the Commission's order, EFIS Docket Number 313, Order Directing Identification of Irrelevant Evidence, effective April 18, 2008. EFIS Docket Number 234, *Motion for Leave to File Additional Supplemental Direct Testimony and Notice of Withdrawal of Certain Regulatory Plan Requests*, filed February 25, 2008 by Great Plains and KCPL.

> regulatory "Additional Amortizations" to maintain the investment-grade credit rating that Aquila anticipates receiving upon approval of its acquisition by Great Plains Energy.
>
> 4) Aquila Senior Executive Severance Costs: Joint Applicants will not request recovery in a future rate case of $16.7 million in severance expense related to departing Aquila senior executives. When combining this adjustment with the re-classification of $13.6 million in non-executive severance expense as Transition Costs, the total amount of Transaction Costs that Joint Applicants will seek to recover has been reduced from $95.2 million to $64.9 million, of which $47.2 million is Missouri jurisdictional.

49. The Commission finds that the issues removed from the merger plan, as listed in Finding of Fact Number 41 no longer require a decision by the Commission in this matter and that any testimony regarding these issues is irrelevant.[147]

50. Although all of the parties were given the opportunity, none chose to file responsive testimony to the Additional Supplemental Direct Testimony filed by Great Plains and KCPL.[148]

51. Rebuttal witnesses Maurice Brubaker (AgProcessing/Praxair/SIEUA), James R. Dittmer (Public Counsel), Russell W. Trippensee (Public Counsel) and Robert E. Schallenberg (Staff) did not update their prefiled testimony after the Applicants revised their merger proposal prior to the evidentiary hearing. None of these witnesses filed responsive testimony to the Additional Supplemental Direct Testimony filed by Great Plains and KCPL.[149]

52. The Industrial Intervenors, Public Counsel and Staff specifically requested that the Commission eliminate, from the proposed procedural schedule, the deadlines for filing responsive testimony to the

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[147] The issue involving Regulatory Amortizations was ruled to be irrelevant on April 24 when the Commission ruled on Great Plains and KCPL's motion to limit the scope of these proceedings. See Transcript Volume 15, pp. 2073-2118.
[148] See EFIS docket entries for EM-2007-0374.
[149] See EFIS Docket Sheet reflecting no updated prefiled testimony for these witnesses. Staff Exh. 100; OPC Exhs. 200-201; Industrial Intervenors' Exh. 300; Transcript, p. 1652, lines 7-25, p. 1653, lines 1-5, p. 1905, lines 12-20 (Brubaker), pp. 1724-1727 (Dittmer), p. 1823, lines 14-17 (Schallenberg); Transcript, pp. 2885-2888 (Trippensee).

Additional Supplemental Direct Testimony filed by Great Plains and KCPL.[150] Their unopposed request was granted.[151]

53. Russell W. Trippensee (Public Counsel), provided rebuttal testimony regarding the Applicants' original request for the Commission to consider a regulatory plan involving the use of "Additional Amortizations."[152] While the Commission received this testimony into the record to evaluate if it had any probative value as to the company's credit-worthiness, the original merger proposal was changed after the filing of Mr. Trippensee's testimony and the Applicants no longer seek consideration of any regulatory plan involving "Additional Amortizations."[153]

54. Witness Russell W. Trippensee (Public Counsel) did not update, revise, or amend his prefiled testimony after the Applicants revised their merger proposal, and did not update his prefiled testimony with live testimony after the merger plan was revised.[154]

55. Witness Russell W. Trippensee provided no documentary support for the positions advocated in his testimony.[155]

56. While on the witness stand, Witness Trippensee was composed, confident, sincere, and unwavering. He was articulate and his live hearing testimony was consistent with his prefiled testimony. His testimony was credible, but because the primary focus of his testimony related to issues not part of the revised merger proposal, it was not substantial.

57. James R. Dittmer (Public Counsel), provided rebuttal testimony on purported merger synergies, transaction cost recovery and the issues surrounding the companies' credit-worthiness.[156]

58. Witness James R. Dittmer (Public Counsel) did not update, revise, or amend his prefiled testimony after the merger proposal was revised.[157]

59. Mr. Dittmer did not perform an analysis on Missouri Jurisdictional figures associated with the proposed transaction.[158]

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[150] See *Response of Staff Public Counsel, Praxair, AGP and SIEUA to Procedural Schedule Proposed by Joint Applicants*, filed on March 4, 2008.
[151] See *Second Order Adopting Procedural Schedule*, Effective March 11, 2008.
[152] OPC Exh. 201.
[153] See Finding of Fact Numbers 35, 36 and 41 and their associated footnotes.
[154] OPC Exh. 201; Transcript, pp. 2885-2888 (Trippensee).
[155] *Id*.
[156] OPC Exh. 200.
[157] *Id*.; Transcript, pp. 1724-1727.
[158] Transcript, pp. 1712-1713.

60. Witness Dittmer provided limited documentary support for the positions advocated in his testimony.[159]

61. Mr. Dittmer did not analyze the Applicants' calculated synergies in detail, did not perform a "bottom-up" calculation of potential savings, was not sure what synergies are achievable, believes that it is possible the company could achieve 132 million dollars in savings, and he expects there will be significant synergy savings achieved by the proposed merger.[160]

62. Throughout Witness Dittmer's live testimony regarding synergy savings he made reference to agreeing with the Applicants' math with regard to their synergy calculations, but qualified his answers by stating, and/or implying, that the Commission could not have faith in the mathematical analysis. However, Mr. Dittmer did not provide a complete qualitative or quantitative independent analysis to discredit the Applicants' math. With regard to these statements, the Commission finds Mr. Dittmer's testimony to have diminished credibility.[161]

63. While on the stand, Witness Dittmer was composed, confident, and sincere. He was articulate and his live hearing testimony was consistent with his prefiled testimony. His testimony was credible with the exception of the credibility issues identified in Finding of Fact Number 55, and with the exception of other specific credibility findings made in other portions of this Order; however, because he did not perform a full synergy analysis, or an updated analysis, his testimony with regard to estimated synergies is not substantial.[162]

64. Maurice Brubaker (AgProcessing/Praxair/SIEUA) provided rebuttal testimony on purported merger synergies.[163]

65. Maurice Brubaker provides only a limited analysis regarding the issues of merger related synergies. As he stated in his testimony, "My testimony does not address the specifics of the synergies that the Applicants contend will be achieved. My testimony utilizes the claimed synergies and in that context analyzes the proposed regulatory plan, its weaknesses, and the effect on customers."[164]

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[159] OPC Exh. 200, Schedules JRD 1-3.
[160] Transcript, pp. 1720-1723.
[161] Transcript, pp. 1654-1781.
[162] See also Finding of Fact Number 101 -- a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony.
[163] Industrial Intervenors' Exh. 300.
[164] *Id*., p. 4, lines 5-8.

66. Maurice Brubaker focused his testimony primarily on evaluating the originally proposed synergies-sharing plan, a plan that was removed from the revised merger proposal.[165]

67. Witnesses Maurice Brubaker (AgProcessing/Praxair/SIEUA) did not appear before the Commission and did not update, revise, or amend his prefiled testimony by virtue of live testimony after Great Plains and KCPL revised their merger proposal.[166]

68. Witness Maurice Brubaker provided some documentary support for the positions advocated in his testimony; however, as noted above, the primary focus of his testimony was on subject matter no longer relevant to the merger proposal.[167]

69. Witness Brubaker did not appear before the Commission and the Commission is unable to make demeanor and credibility findings regarding live testimony. His prefiled testimony was credible; however, because he did not perform a full analysis on the subject matter for which he purported to be offering testimony, and because his testimony was primarily focused on subject matter no longer relevant to the merger proposal, the Commission finds his testimony to be insubstantial.

70. Witness James Rose, called by Staff, is employed by Aquila as a senior manager in the risk assessment audit service department.[168]

71. Witness Rose did not provide testimony utilizing his expertise as an auditor. Mr. Rose provided testimony regarding his personal knowledge of what transpired at the joint owners meetings he attended regarding the Iatan construction projects. He also offered his opinion as to whether the companies were accurately considering invoicing and cost controls for the Iatan projects at those meetings.[169]

72. Witness Max Sherman, called by Staff, is employed by Aquila as Vice President of Strategic Initiatives.[170]

73. Witness Sherman did not provide testimony utilizing his expertise, but rather provided testimony regarding his personal knowledge of what transpired at the joint owners meetings he attended

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[165] Industrial Intervenors' Exh. 300. See also Findings of Fact Number 35, 36 and 41 and their associated footnotes.
[166] *Id*.; Transcript, p. 1652, lines 7-25, p. 1653, lines 1-5, p. 1905, lines 12-20.
[167] *Id*..
[168] Transcript, pp. 2805-2834.
[169] *Id*.
[170] Transcript, Volume 21, pp. 2835-2884.

regarding the Iatan construction projects in relation to whether the Iatan projects were under a challenge with regard to completion date and control budget.[171]

74. While on the witness stand, witnesses Rose and Sherman were composed, confident, and sincere. Their testimony was credible; however, the testimony did not involve their employment and expertise but rather was only testimony regarding their personal knowledge surrounding certain company meetings.[172]

75. Rebuttal witnesses Maurice Brubaker (AgProcessing/Praxair/SIEUA), James R. Dittmer (Public Counsel), Russell W. Trippensee (Public Counsel), Robert E. Schallenberg (Staff) did not update any of the schedules, appendices or reports attached to and submitted with their prefiled testimony after the Applicants revised their merger proposal prior to the evidentiary hearing.[173]

76. None of the witnesses providing opposition testimony to the approval of the merger, i.e., Schallenberg, Dittmer, Trippensee and Brubaker, provided a "bottom-up" analysis of the expected synergies that are calculated to result from the operational integration of KCPL and Aquila.[174]

77. Mr. Schallenberg was the only witness proffered by Staff in this matter.[175]

78. Witness Schallenberg (Staff) provided rebuttal testimony on purported merger synergies, transaction cost recovery, the proposed waiver of the Commission's affiliate transactions rule, service quality, and the issues surrounding the companies' credit-worthiness.[176]

79. Witness Schallenberg (Staff) provided only a limited analysis regarding the issues of merger-related synergies because of the legal argument that the Applicants had not properly pled their request for relief pursuant to Section 393.190, and, consequently, Staff asserts that the Commission can not consider the evidence about synergy savings.[177]

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[171] *Id*.
[172] Transcript, Volume 21, pp. 2805-2884.
[173] Staff Exh. 100; OPC Exhs. 200-201; Industrial Intervenors' Exh. 300; Transcript p. 1652, lines 7-25, p. 1653, lines 1-5, p. 1905, lines 12-20 (Brubaker), pp. 1724-1727, lines 1-9 (Dittmer), p. 1823, lines 14-17 (Schallenberg); Transcript Volume 21, pp. 2885-2888 (Trippensee).
[174] See Findings of Facts Numbers 46-62 and 68, *supra*.
[175] See Transcripts, Volumes 1-26.
[176] Staff Exh. 100.
[177] *Id*., see in particular pp. 11-12 and 43-44; Transcript, pp. 1820-23 and pp. 1844-1949.

80. The Commission's Staff did not "do a bottom-up audit of all the allegations of savings."[178]

81. Witness Schallenberg (Staff) did not update, revise, or amend his prefiled testimony after the Applicants revised their merger proposal.[179]

82. All of the items of testimony that Mr. Schallenberg listed on the schedules to his testimony in this case were prepared while he was either a member of the auditing or accounting department or as the Division Director of the Utility Services Division.[180]

83. Mr. Schallenberg has not provided testimony in any merger case on quality service issues, with the exception of the Report he sponsored in this matter.[181]

84. Mr. Schallenberg has not provided prefiled or live testimony in a merger case before the Commission for at least 15 years.[182]

85. Mr. Schallenberg's testimony consisted of four full pages and the start of a fifth page: page one is composed of his biography; page two is a description of his duties as a Regulatory Auditor V with the Commission; page three is the listing of topics upon which he offered testimony; and page four and five are where his testimony on the substantive issues of this case begins.[183]

86. Other than the attached Staff Report, Mr. Schallenberg offers no other prefiled testimony on the substantive issues in this matter.[184]

87. The Staff Report is not sworn and, it bears no author(s) identification.[185]

88. Mr. Schallenberg claimed "ultimate" authorship of the Staff Report during his cross-examination.[186]

89. Mr. Schallenberg acknowledged that Lisa Kramer, Utility Regulatory Manager, provided him with a draft of the section of the

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[178] *Id*.
[179] Staff Exh. 100; Transcript, p. 1823, lines 14-17 (Schallenberg). See Findings of Fact 35, 36 and 41 and their associated footnotes.
[180] Transcript, pp. 1782-1907, Schallenberg testimony.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.

Report dealing with service quality issues, i.e., pages 68-76 of the Report.[187]

90. Mr. Schallenberg acknowledged that Kim Bolin, Utility Regulatory Auditor V, wrote the initial draft of the part of the Report concerning the Kemp study.[188]

91. Mr. Schallenberg acknowledged that the portions of the Report addressing Missouri Revised Statutes and Missouri case law were either drafted by members of the General Counsel's Office or were copied out of prior Commission orders.[189]

92. Mr. Schallenberg acknowledged that the portions of the Report addressing state statues and case law, and the interpretations of those, were drafted either by Steve Dottheim, Chief Deputy Counsel, or Nathan Williams, Deputy Counsel, lawyers in the General Counsel's Office.[190]

93. Mr. Schallenberg stated that other than the sections of the Report on service quality and the Kemp study, that "I would have been the initial author on all of it (the Report).[191]

94. Mr. Schallenberg acknowledged that with regard to the section of the Report concerning actual debt cost recovery, he had some of the schedules and numbers checked through financial analysis by Matt Barnes, Utility Regulatory Auditor II, and Ron Bible, Utility Regulatory Manager.[192]

95. Lisa Kramer, Kim Bolin, Nathan Williams, Steven Dottheim, Matt Barnes and Ron Bible were not proffered as witnesses by Staff in this matter.

96. Lisa Kramer, Kim Bolin, Nathan Williams, Steven Dottheim, Matt Barnes and Ron Bible did not prefile testimony, provide live testimony and were not subject to cross-examination by the parties or the Commission.

97. Great Plains and KCPL lodged an objection to the admission of the Staff's Report when it was offered into evidence stating:

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[187] *Id*.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*.
[192] Transcript, pp. 1782-1907. The Commission notes that the occupational titles of the Staff personnel identified by Mr. Schallenberg in his testimony, and as listed in Findings of Fact Numbers 82-89 were obtained from the Commission's employee roster. Mr. Schallenberg did not state their titles during his testimony.

> We do object to the 80-page anonymous Staff report which does not contain a statement of who its authors are. We believe it's a blend of opinions of experts in accounting economics, business management, law, customer service and other disciplines and professions. We believe that it is an attempt to prevent other potential witnesses from Staff who would normally testify in merger cases from having their prefiled testimony presented to the Commission. It contains numerous legal arguments. For example, there are citations which I believe Mr. Schallenberg discussed briefly in one of my cross-examinations of not only Commission cases, Supreme Court cases, the first drafts of which were authored by attorneys here at the Commission. These are not the types of materials or sources upon which an expert in at least auditing and accounting like Mr. Schallenberg would normally reasonably rely upon under Section 490.065.3. We also think that it contains numerous examples of anonymous hearsay and other third-party arguments and opinions, and we believe it violates either specifically or at least in spirit the Commission's rules on prefiled testimony found in 4 Code of State Regulations 240-2.130. Specifically, it's not under oath, its authors are not identified and some other technical requirements.[193]

98. The Commission received the Staff's Report into evidence, over objection, noting that the defects listed by Great Plains and KCPL would be taken into consideration regarding the weight and credibility assigned by the Commission to Mr. Schallenberg's testimony and the attached Staff Report.[194]

99. The Commission finds that the information contained in Staff's Report, attached to Mr. Schallenberg's testimony, is deserving of

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[193] Transcript, pp. 2279-2280.

[194] Transcript, p. 2884. The Commission notes that while it did not sustain the hearsay objection to Staff's report, "[A]n expert who consults and merely summarizes the content of a hearsay source without applying his own expertise is merely a hearsay witness." *Graves v. Atchison-Holt Elec. Co-op.,* 886 S.W.2d 1, 7 (Mo. App. 1994). Given Mr. Schallenberg's admitted limits on his expertise, his summaries of other Staff members' contributions to the Report have little credibility in this matter.

only limited weight and credibility related to the defects noted in Findings of Fact Numbers 70-91, *supra.*[195]

100. While on the witness stand, witness Schallenberg was composed and confident in his testimony, and his live hearing testimony was consistent with his prefiled testimony. Mr. Schallenberg's testimony is only credible to the extent of his expertise, as described in Findings of Fact Numbers 99-101, *infra*, and given that he did not perform a full accounting or auditing analysis of the beginning or updated merger proposals, the Commission finds his testimony not to be substantial.

101. Individual witness biographies are footnoted throughout this Report and Order at the time of the initial reference to each witness's testimony.[196]

102. Section 490.065 sets forth standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings.[197]

103. Section 490.065 states:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
> 2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

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[195] See Transcript, pp. 1782-1907 (cross-examination revealing the diminished credibility of Staff's Report).

[196] The Commission did not receive extensive biographies on witnesses Jon Empson, Richard C. Green, Michael Chesser, Brent Davis, Steven Easley, or Terry Foster. These witnesses provided only live testimony before the Commission.

[197] *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003).

> 4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

104. The Commission finds that the following witnesses are subject matter experts for their individual fields of expertise as identified in their uncontroverted prefiled and live testimony:

> Terry Bassham (GPE/KCPL), Kevin E. Bryant (GPE/KCPL), Wallace P. Buran (GPE/KCPL), Lora Cheatum (GPE/KCPL), Michael W. Cline (GPE/KCPL), F. Dana Crawford (GPE/KCPL), William H. Downey (GPE/KCPL), Chris Giles (GPE/KCPL), William P. Herdegen (GPE/KCPL), William J. Kemp (GPE/KCPL), John Marshall(GPE/KCPL), Tim M. Rush (GPE/KCPL), Richard A. Spring (GPE/KCPL), Robert F. Steinke (GPE/KCPL), Charles H. Tickles (GPE/KCPL), Paul Van Dyne (GPE/KCPL), Lori A. Wright (GPE/KCPL), Robert T. Zabors (GPE/KCPL), R. Thomas Fleener (Aquila), Wayne A. Cauthen (KCMO), Robert J. Hix (KCMO), Russell W. Trippensee (Public Counsel), James R. Dittmer (Public Counsel), Paul N. Mahlberg (Independence), Mark J. Volpe (Independence), Robert Janssen (Dogwood Energy), John E. Grotzinger (MJMEUC) and Maurice Brubaker (AgProcessing/Praxair/SIEUA).

105. Witnesses James Rose and Max Sherman did not offer testimony based upon their areas of educational and employment expertise. The Commission finds them to be fact witnesses only, and not subject matter expert witnesses.

106. The Commission finds that witness Robert E. Schallenberg (Staff) is not a subject matter expert witness in the following specialty areas or occupations, as admitted in his uncontroverted live testimony:[198] Engineer, Economist, Lawyer, Computer Specialist in Information Technology or Information Systems, Management Systems, Management Consulting, Human Resources,

[198] Transcript, pp. 1782-1907.

Investment Banking, Mergers and Acquisitions Specialist, Generating Plants, Transmission and Distribution Systems of Electrical Corporations Operating as Regulated Utilities, Consumer Services, or Management Services.[199]

107. The Commission finds Mr. Schallenberg is an expert witness in relation to his auditing and accounting expertise.

108. Additionally, the Commission finds that regardless of the general credibility findings made in Findings of Facts Numbers 21 through 100, a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony.[200]

C. Findings of Fact Regarding Aquila's Decision to Transfer Its Assets

109. Following Aquila's September 2005 announcement of its sale of four utility operations and its need to effectively deploy those sale proceeds, the Aquila Board of Directors ("Aquila's board") determined that it would be appropriate to conduct a strategic review of Aquila's remaining operations and consider alternatives to its stand-alone plan that could provide greater shareholder value.[201]

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[199] *Id*.

[200] As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl,* 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel,* 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell,* 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark,* 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc*., 782 S.W.2d 170, 173 (Mo. App. 1990).

[201] GPE/KCPL Exh. 14, **Fleener Direct**, pp. 1-9. See Generally Transcript, pp. 615-695.

R. Thomas Fleener is presently employed by Aquila, Inc. ("Aquila") as Vice President of Corporate Development. He has held this position with Aquila since mid-2004. Prior to this he served as Vice President of Corporate Development for Aquila Merchant Services. He began his employment with Aquila in July 2001. Prior to joining Aquila, he worked for Verizon Corporation where he was involved in corporate development, finance and accounting matters. He has an MBA from the University of Texas at Austin and a Bachelor of Science degree in business from Trinity University. At Aquila he is primarily responsible for leading corporate development, mergers and acquisitions, and other strategic initiatives

110. Aquila began its strategic review process in the fall of 2005. Aquila continued to refine its strategic plan and underlying financial models throughout 2006.[202]

111. As part of this strategic review, Aquila compared its baseline stand-alone plan against other corporate business structure alternatives, such as a potential business combination or additional asset sales.[203]

112. As a result of the strategic review, Aquila's board determined that shareholder value would most likely be maximized through a sale of Aquila.[204]

113. Aquila retained The Blackstone Group L.P. ("Blackstone") and Lehman Brothers Inc. ("Lehman Brothers") to advise Aquila on this transaction, and Evercore Group L.L.C. ("Evercore") to advise the independent members of Aquila's board regarding this transaction.[205]

114. Aquila has previously worked with Blackstone, Lehman Brothers and Evercore. Most recently, Aquila worked with these financial advisors in connection with the sale of Aquila's Michigan, Minnesota and Missouri gas operations and Kansas electric operations. Evercore has acted as the financial advisor to Aquila's independent directors since 2002, having provided advice to the independent directors on numerous aspects of Aquila's strategic restructuring transactions (including its liability management plans, asset sales and now, the merger).[206]

115. In May 2006, Aquila's financial advisors recommended, and Aquila's board authorized, Aquila's management to approach nine parties identified as potential buyers.[207]

116. In determining which parties to contact, Aquila considered, among other things, the logical potential bidders (in terms of operational synergies, financial wherewithal, M&A capability, etc.) and the parties that expressed an interest previously in acquiring all or

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for Aquila. In this transaction, he was responsible for managing the execution of the strategy, and is currently involved in satisfying the conditions to close the transaction.

[202] *Id*. For example, Aquila updated its stand-alone analysis as part of its normal quarterly process during 2006 and again when Aquila concluded its annual budgeting process in the fall of 2006. *Id*.

[203] *Id*.

[204] *Id*.

[205] *Id*.

[206] *Id*.

[207] *Id*.

portions of Aquila. The nine parties included seven strategic parties and two financial parties.[208]

117. Seven (five strategic and two financial) of the nine contacted parties signed confidentiality agreements. The two other contacted parties declined to participate in the process, citing (i) in one case, an unwillingness to participate in an auction process and a view that delivering a premium to the then-current share price of approximately $4.20 could be challenging, and (ii) in the other case, an interest only in a portion of Aquila's regulated operations.[209]

118. Of the seven parties that signed confidentiality agreements, six were provided with confidential marketing materials, including the Company's financial projections. The seventh party elected not to continue in the process.[210]

119. Five parties submitted non-binding indicative bids in July 2006. Each indication of interest was conditional upon further due diligence and the confirmation of certain assumptions made by the party submitting the indication of interest.[211]

120. Each of the five parties that submitted a non-binding indication of interest was invited to conduct detailed due diligence and to submit a definitive offer in the second round of the sale process.[212]

121. In late August or early September of 2006, Aquila's management made presentations about Aquila's business operations to four of the five bidding entities participating in the second round of the process. The fifth participant declined an invitation to receive the management presentation.[213]

122. Of the five participants invited into the second round, only one bidder group (the Great Plains-Black Hills bidder consortium) submitted an offer in late November 2006. It was non-binding and contingent on the Company entering into exclusive negotiations to finalize the commercial terms of definitive agreements.[214]

123. On December 8, 2006, after receiving detailed presentations regarding the status of the sale process and terms of the bid received from Great Plains and Black Hills, Aquila's board authorized

[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] *Id*.
[212] *Id*.
[213] *Id*.
[214] *Id*.

Aquila to enter into exclusive negotiations with Great Plains and Black Hills in pursuit of a sale of Aquila.[215]

124. No other parties contacted Aquila or its advisors regarding a potential business combination.[216]

125. At no point during the process did Aquila or its advisors receive any credible, unsolicited expressions of interest (that is, legitimate proposals from companies with sufficient balance sheet capacity, utility experience or merger and acquisition experience), even though reports of a potential sale of Aquila existed in the marketplace.[217]

126. As shown by Aquila's Securities and Exchange Commission filings, Aquila's board was closely involved in the events that occurred throughout the period leading to the merger announcement. The process was discussed at every regularly scheduled Aquila board meeting, and between October 2006 and February 6, 2007, Aquila's board held eight special meetings solely to discuss the sale. Aquila's board also received updates periodically from man agement throughout the process, particularly as significant events occurred (such as the withdrawal of a bidder or events that could affect Aquila's stand-alone value).[218]

127. Before unanimously approving the merger on February 6, 2007, Aquila's board received from Blackstone and Lehman Brothers, and the independent members of Aquila's board received from

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[215] *Id*.
[216] *Id*.
[217] *Id*. For example, articles reported during the process include:
• July 2006: *Power Finance and Risk* reported Aquila had put itself up for sale;
• July 2006: *Reuters* reported on the *Power Finance and Risk* article, and the *Reuters* article was subsequently picked up by other sources, such as *The Energy Daily* and the *Kansas City Star;*
• July 2006: *The Australian Financial Review* reported that Aquila was for sale and that Australian companies were likely bidders;
• July 2006: *The Kansas City Star* reported on the market speculation surrounding Aquila having reportedly put itself up for sale;
• July 2006: *The Deal* listed Aquila in its "New on the Block" section, which tracks companies that have (or reportedly have) put themselves up for sale;
• July 2006: *Corporate Finance Weekly* reported Aquila had launched a sales process and hoped to "hook" a buyer in the $5.00 - $5.50 per share range; and
• November 2006: *Financial Times* reported Aquila was evaluating bids for a potential sale of the company.
Aquila did not confirm or deny these reports. Aquila's long-standing policy has been, and continues to be, not to comment on speculation regarding Aquila's future. For obvious reasons, Aquila maintained this policy during the sales process. *Id.*
[218] *Id*.

Evercore, opinions that, considering the assumptions and other qualifications at that time, the financial consideration to be received by Aquila's shareholders was fair.[219]

D. Findings of Fact Regarding the Structure of the Merger Transactions

128. The merger application filed with the Commission outlines a series of three transactions: (1) the Assets Purchase Agreement ("APA") among Aquila, Inc., Black Hills, Great Plains, and Gregory; (2) the Partnership Interests Purchase Agreement ("Black Hills Purchase" or "PIPA"); and (3) the Agreement and Plan of Merger ("Gregory/Aquila Merger").[220]

129. Each transaction is conditioned upon the closing of the other transactions.[221]

130. Each transaction is subject to regulatory approval, and the merger is subject to approval by the shareholders of Aquila and Great Plains.[222]

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[219] *Id*. At Aquila's request, Blackstone, Lehman Brothers and Evercore prepared drafts of the information they will be required to provide for Aquila's merger proxy statement with respect to their fairness opinions. The materials prepared by Blackstone, Lehman Brothers and Evercore are attached as an exhibit to the Schedule 14A filed with the Securities and Exchange Commission by Aquila on March 7, 2007, which is available at: http://www.sec.gov/Archives/edgar/data/66960/000006696007000032/0000066960-07-000032-index.htm. *Id*.

[220] *Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc*., pp. 4-11, paragraphs 6-24, filed April 4, 2007; Staff Exh. 100, Schallenburg Rebuttal, *Staff Report of Staff's Evaluation and Recommendations Regarding Great Plains Energy Incorporated's Proposed Acquisition of Aquila, Inc*., pp. 37-40, filed October 12, 2007. GPE/KCPL Exh. 1, **Bassham Direct**, pp. 2-17.

Terry Bassham is employed by Great Plains as Executive Vice President, Finance & Strategic Development, and Chief Financial Officer, and employed by KCPL as Chief Financial Officer. His responsibilities include the oversight of Great Plains financial activities, as well as the oversight of KCPL's finance and accounting departments. He holds a Bachelor of Business Administration degree in Accounting from the University of Texas at Arlington and a Juris Doctor degree from St. Mary's University School of Law in San Antonio, Texas. He has held his current positions at Great Plains and KCPL since April of 2005. Prior to that time, he was employed by El Paso Electric for nine years in various positions including General Counsel, Chief Administrative Officer and Chief Financial Officer. He has provided pre-filed testimony in KCPL's 2006 rate cases before both the Missouri Public Service Commission ("Commission") and the Kansas Corporation Commission ("KCC") and has testified before the Federal Energy Regulatory Commission, the Public Utility Commission of Texas, the New Mexico Public Service Commission and various legislative committees of the Texas and New Mexico legislatures.

[221] GPE/KCPL Exh. 1 Bassham Direct, pp. 2-17.

[222] *Id*.

131. Under the terms of the APA, Aquila will transfer to Black Hills the assets associated with Aquila's natural gas operations in Nebraska, Kansas and Iowa.[223]

132. The transactions contemplated by the APA are subject to a number of conditions, including: (i) a waiver from, or the approval of, the Kansas Corporation Commission under the "standstill" obligations imposed on Aquila; (ii) the approval of the Kansas Corporation Commission, Iowa Utilities Board, and Nebraska Public Service Commission; (iii) the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended; (iv) the readiness of Great Plains and Aquila to complete the merger; and (v) the absence of a materially adverse effect on the businesses being acquired by Black Hills, including the businesses being acquired by Black Hills under the PIPA.[224]

133. Under the terms of the PIPA, Aquila will transfer to Black Hills the assets associated with Aquila's natural gas and electric operations in Colorado.[225]

134. The PIPA will be effectuated through the following series of transactions: (i) Aquila will form two Delaware limited partnerships, called "Electric Opco" and "Gas Opco"; (ii) Aquila will be the general partner thereof; (iii) Aquila's subsidiary, Aquila Colorado, L.L.C., will be a limited partner of "Electric Opco" and "Gas Opco"; (iv) immediately before closing, Aquila will transfer its Colorado electric assets to Electric Opco and its Colorado natural gas assets to Gas Opco; and (v) Aquila and Aquila Colorado, L.L.C., will then sell their partnership interests in Electric Opco and Gas Opco to Black Hills.[226]

135. The transactions contemplated by the PIPA are also subject to a number of conditions, including (i) a waiver from, or the approval of, the Kansas Corporation Commission under the "standstill" obligations imposed on Aquila; (ii) the approval of the Colorado Public Utilities Commission; (iii) the approval of the Federal Energy Regulatory Commission; (iv) the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended; (v) the readiness of Great Plains and Aquila to complete the merger; and (vi) the absence of a materially adverse effect on the businesses being

[223] *Id*.
[224] *Id*.
[225] *Id*.
[226] *Id*.

acquired by Black Hills, including the businesses being acquired by Black Hills under the APA.[227]

136. Following the closing of the APA and PIPA transactions, Black Hills will own and operate the natural gas assets of Aquila in Nebraska, Kansas, Iowa, and Colorado. Black Hills will also own Aquila's Colorado electric assets.[228]

137. Black Hills will assume the liabilities directly associated with the assets it acquires through the PIPA.[229]

138. Black Hills will also acquire the intellectual property associated with doing business under the Aquila name and upon consummation of the merger, if approved, Great Plains will rename Aquila, pending Commission approval.[230]

139. Immediately following the consummation of the PIPA, Gregory will merge with Aquila, and Aquila will be the surviving entity.[231]

140. The primary document controlling the Gregory/Aquila Merger is the Agreement and Plan of Merger dated February 6, 2007, which was executed by Aquila, Great Plains, Black Hills, and Gregory.[232]

141. Great Plains will purchase the outstanding shares of Aquila for consideration consisting of Great Plains stock and cash.[233]

142. When asked why the merger was structured in this fashion, Witness Chris Giles, KCPL's Vice President of Regulatory Affairs, replied:

> There were four primary reasons. One, and I think this has been mentioned in prior testimony, is the outstanding liabilities, potential liabilities of Aquila. That was one reason. Another one was the status of the RTO, which the Commission has just heard, but at this point Aquila is a participating member of MISO [Midwest Independent Transmission System Operator]. KCPL is SPP [Southwest Power Pool]. A third reason was the market power issues. We did not believe we had market power issues if we were to consolidate the two companies, but to be on the safe side and get a rapid

[227] *Id*.
[228] *Id*.
[229] *Id*.
[230] *Id*.
[231] *Id*.
[232] GPE/KCPL Exh. 1 Bassham Direct, pp. 2-17.
[233] *Id*.

> FERC approval, we thought it would be better to not. And the fourth reason is purely from an administrative standpoint. We would have had to transfer all the franchises and all the contracts and the financings, potentially getting consent agreements on a number of financings. So from a time standpoint we didn't feel like it was a needed thing to do.[234]

143. Great Plains intends to purchase each of the outstanding shares of Aquila stock for $1.80 cash plus 8.56% shares of Great Plains stock. [235] It is anticipated that Great Plains will pay approximately

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[234] Transcript, pp. 1486-1488 (**Giles testimony**).

Chris B. Giles is employed by KCPL as Vice President of Regulatory Affairs. His responsibilities include all aspects of regulatory activities including cost of service, rate design, revenue requirements, and tariff administration. He graduated from the University of Missouri at Kansas City in 1974 with a Bachelor of Arts degree in Economics and in 1981 with a Master of Business Administration degree with concentrations in accounting and quantitative analysis. He was first employed at KCPL in 1975 as an Economic Research Analyst in the Rates and Regulation Department. He held positions as supervisor and manager of various rate functions until 1988 when he was promoted to Director of Marketing. In January 1993, he returned to the rate area as Director of Regulatory Affairs. In March of 2005, he was promoted to Vice-President or Regulatory Affairs. He has previously testified before both the Commission and the Kansas Corporation Commission on numerous issues regarding utility rates and regulation

[235] GPE/KCPL Exh. 1, Bassham Direct, p. 8; Staff Exh. 100, **Schallenburg Rebuttal**, *Staff Report of Staff's Evaluation and Recommendations Regarding Great Plains Energy Incorporated's Proposed Acquisition of Aquila, Inc*., pp. 38-39, filed October 12, 2007.

Robert E. Schallenberg is the Director of the Utility Services Division of the Missouri Public Service Commission. He graduated from the University of Missouri at Kansas City in 1976 with a Bachelor of Science Degree and major emphasis in Accounting. In November 1976, he successfully completed the Uniform Certified Public Accountant (CPA) examination and subsequently received the CPA certificate. In 1989, he received his Missouri license as a CPA. He began employment with the Commission as a Public Utility Accountant in 1976. In May 1978, he accepted the position of Senior Regulatory Auditor with the Kansas State Corporation Commission, but returned to the Commission in October of that same year. Prior to October 1997, he was an Audit Supervisor/Regulatory Auditor V and in October 1997, he began his current position. As a Regulatory Auditor V for the Commission, he had several areas of responsibility including: (1) conducting timely and efficient examination of the accounts, books, records and reports of jurisdictional utilities; (2) aiding in the planning of audits and investigations, including staffing decisions, and in the development of Staff positions in cases to which the Accounting Department of the Commission was assigned; (3) serving as lead auditor, as assigned on a case-by-case basis; (4) assisting in the technical training of other auditors in the Accounting Department; (5) preparing and presenting testimony in proceedings before the Commission and the Federal Energy Regulatory Commission (FERC), and aiding the Commission's Staff attorneys and the Washington, D.C. counsel in the preparation of pleadings and for

$1.6 billion for Aquila stock at that time. This price is based upon a market price for Great Plains' stock of $28.82.[236]

144. Black Hills will pay Aquila approximately $940 million in cash on consideration for the Black Hills Purchase. A portion of those proceeds will, with additional cash from Great Plains, fund the approximate $677 million cash element of the consideration received by Aquila's shareholders under the terms of the Agreement and Plan of Merger.[237]

145. The Gregory/Aquila merger has a total indicated value of approximately $1.7 billion.[238]

146. Great Plains will assume approximately $1 billion of Aquila net debt and other liabilities.[239]

147. Great Plains, in its original merger proposal, estimated the total costs to achieve the merger to be approximately $181 million.[240]

148. The Gregory/Aquila merger was subject to a number of conditions, including (i) approval by Aquila's shareholders and the shareholders of Great Plains; (ii) approval by the Federal Energy Regulatory Commission, the KCC and this Commission; (iii) the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended; (iv) the receipt of all regulatory approvals and completion of the Black Hills Purchase;

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hearings and arguments, as requested; and (6) reviewing and aiding in the development of audit findings and prepared testimony to be filed by other auditors in the Accounting Department. He has presented testimony before the Commission on issues ranging from the prudence of building power plants to the appropriate method of calculating income taxes for ratemaking purposes. He has also submitted testimony in proceedings before the FERC.

[236] Staff Exh. 100 at p. 39. In their Post-Hearing Brief, the Applicants represented, that based upon Great Plains' closing New York Stock Exchange stock price on May 30, 2008 of $26.23, the merger represented a value of $4.05 per share of Aquila common stock. See EFIS Docket Number 449, Post-Hearing Brief of Joint Applicants Great Plains Energy, Inc., Kansas City Power and Light Co. and Aquila, Inc., filed June 2, 2008, p. 6.

[237] GPE/KCPL Exh. 1, Bassham Direct, p. 8, lines 21-23, p. 9, lines 1-2.

[238] GPE/KCPL Exh. 1, Bassham Direct, p. 8.

[239] *Id*.

[240] *Id*. at 9. This estimate was made prior to revising the merger plan that removing certain executive compensation costs and costs of debt. EFIS Docket Number 386, *Identification of Evidence that is No Longer Relevant to the Joint Application*, filed by Great Plains and KCPL on May 9, 2008, pursuant to the Commission's order, EFIS Docket Number 313, Order Directing Identification of Irrelevant Evidence, effective April 18, 2008. EFIS Docket Number 234, *Motion for Leave to File Additional Supplemental Direct Testimony and Notice of Withdrawal of Certain Regulatory Plan Requests*, filed February 25, 2008 by Great Plains and KCPL. See also Findings of Fact Numbers 41, 171 and 421.

and (v) the absence of a materially adverse effect on the Aquila businesses that remain after giving effect to the Black Hills Purchase.[241]

149. Following the completion of the Black Hills Purchase, the Aquila corporate entity will consist of (i) Aquila's current Missouri electric operations, *i.e.*, Aquila Networks-MPS and Aquila Networks-L&P; (ii) Aquila's St. Joseph Industrial Steam operations; and (iii) Aquila's merchant services operations, which primarily consist of the 340 MW Crossroads power generating facility in Mississippi and certain residual natural gas contracts, that have been hedged to address price risk.[242]

150. As a result of the merger, Aquila will become a direct, wholly-owned subsidiary of Great Plains, just as KCPL. [243]

151. KCPL and Aquila will be affiliated entities by virtue of Great Plain's common ownership of both. [244]

152. Although Aquila and KCPL will remain separate legal entities, many of the companies' operational functions will be integrated and centralized after the merger closes.[245] The Applicants have not filed a joint operators agreement, but they have offered to file one if the Commission so directs them.[246]

153. Although employees will be transferred between KCPL and Aquila, and certain operations will be centralized, the integration of KCPL's and Aquila's operations will not involve the sale or transfer of utility assets between KCPL and Aquila.[247]

154. Upon completion of the Gregory/Aquila Merger, Aquila's current shareholders will own approximately 27% of Aquila's outstanding common stock and Great Plains' current shareholders will own the remaining 73%.[248]

155. The merger will expand Great Plains' electric utility service territory around the Kansas City metropolitan area by adding

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[241] GPE/KCPL Exh. 1, Bassham Direct, pp. 7-8.
[242] *Id*. at 3.
[243] *Id*. at 7-8.
[244] *Id*.
[245] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 1. Since announcing the merger, Great Plains, Aquila, and KCPL have worked on the processes, procedures, and practical aspects of centralizing Aquila's and KCPL's operations. The major objective has been to select the "best-in-class" operations of each utility for implementation across the board, in order to create synergy savings, and to maintain or improve customer service at both Aquila and KCPL. *Id.* at 1-2.
[246] Transcript pp. 1463-1465.
[247] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 2.
[248] GPE/KCPL Exh. 1, Bassham Direct, p. 9.

approximately 300,000 electric utility customers to the 500,000 customers Great Plains currently serves through KCPL. [249]

156. The newly merged company will serve a combined metropolitan customer base of over 625,000, an increase of almost 40% for KCPL today, and will add over 170,000 rural customers. [250]

157. Following the merger, Great Plains' utility subsidiaries will have a generating capacity of approximately 5,800 megawatts.[251]

158. The KCPL and Aquila combined service territory will be comprised of 21,770 distribution primary circuit miles over approximately 18,000 square miles.[252]

159. Aquila's shareholders approved the three transactions on October 9, 2007.[253]

160. The shareholders of Great Plains approved the three transactions on October 10, 2007.[254]

161. The transactions did not require the approval of Black Hills' shareholders.[255]

162. The Federal Energy Regulatory Commission ("FERC") approved the three transactions on October 19, 2007.[256]

163. On August 27, 2007, the Federal Trade Commission announced that it granted early termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[257]

164. The Iowa Utilities Board and the Nebraska Public Service Commission have approved the Black Hills Purchase.[258]

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[249] *Id*. at pp. 3-4.
[250] GPE/KCPL Exh. 21, Marshall Supp. Direct, pp. 1-22.
[251] GPE/KCPL Exh. 1, Bassham Direct, pp. 3-4.
[252] GPE/KCPL Exh. 16, Herdegen Direct, p. 2-3.
[253] See Finding of Fact Number 120; Transcript, p. 1394.
[254] Transcript, p. 1383, 1394,1397-1398; A certified copy of the resolutions of the board of directors of Great Plains authorizing the merger and related transactions contemplated by the agreement and plan of mergers is marked as 7 and attached to the application. *Id*.
[255] EFIS Docket Number 1, Application filed on April 4, 2007 – See all attached Exhibits; EFIS Docket Number 449, *Post-Hearing Brief of Joint Applicants Great Plains Energy, Inc., Kansas City Power and Light Co. and Aquila, Inc.*, pp. 6-7, filed June 2, 2008.
[256] *Great Plains Energy Inc.*, *et al.*, Order Authorizing Disposition and Acquisition of Jurisdictional Facilities and Granting Petition for Declaratory Order, 121 FERC ¶ 61,069 at P 50 (October 19, 2007).
[257] Transcript, p. 1519; EFIS Docket Number 449, *Post-Hearing Brief of Joint Applicants Great Plains Energy, Inc., Kansas City Power and Light Co. and Aquila, Inc.,* pp. 6-7, filed June 2, 2008.
[258] *In re Aquila, Inc.*, Docket No. SPU-07-12 (Iowa Util. Bd., Aug. 31, 2007); *In re Aquila, Inc.*, Application No. NG-0044 (Neb. P.S.C., Oct. 16, 2007).

165. After the Missouri hearings were adjourned in December, the transactions were also approved by both the Colorado Public Utilities Commission and the Kansas Corporation Commission.[259]

166. Only this Commission's approval is needed for the merger to close.

167. The Agreement and Plan of Merger contains certain termination rights for both Aquila and Great Plains, including the right to terminate the agreement if the merger has not closed within twelve months following the date of the agreement (subject to extension to up to 18 months for receipt of regulatory approvals required to consummate the merger and the Black Hills Purchase).[260]

168. The final termination date for failure to close the merger is August 6, 2008.[261]

169. Aquila and Great Plains also each have the right to terminate the Agreement and Plan of Merger in order to enter into a superior transaction after giving the other party six-business-day's notice and an opportunity to revise the terms of the agreement.[262]

170. If Aquila terminates the Agreement and Plan of Merger under specified circumstances, including a termination to enter into a superior transaction, then Aquila would pay to Great Plains a $45 million termination fee. If Great Plains terminates the merger, then Great Plains would pay Aquila a $45 million termination fee and would pay Black Hills a termination fee equal to the lesser of $15 million or the actual transaction costs Black Hills had incurred at the time of termination.[263]

E. Findings of Fact Regarding Costs to Achieve and Merger Synergy Savings

1. Costs to Achieve Synergies

171. Synergy benefits will not be achieved without effort or cost. The costs to achieve need to be considered in evaluating net transaction benefits.[264]

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[259] See *In re Application of Aquila, Inc*., Docket No. 07A-108EG (Colo. P.U.C., Feb. 14, 2008); *In re Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co. and Aquila, Inc*., Docket No. 07-KCPE-1064-ACQ (Kan. Corp. Comm'n, May 15, 2008).

[260] GPE/KCPL Exh. 1, Bassham Direct, pp. 11-12.

[261] See Exhibit 4 to the Application filed on April 4, 2007 (EFIS Docket Number 1), *Agreement and Plan of Merger Among Aquila, Inc. Great Plains Energy Incorporated, Gregory Acquisition Corp. and Black Hills Corporation*, dated February 6, 2007, Article IX Termination, pp. 67-71.

[262] GPE/KCPL Exh. 1, Bassham Direct, pp. 11-12.

[263] *Id*. at pp. 11-12.

[264] GPE/KCPL Exh. 18, **Kemp Supp. Direct,** pp. 1-28.

William J. Kemp is employed as a Managing Director in the Enterprise Management Solutions Division of Black & Veatch Corporation (B&V). He leads B&V's management consulting practice in Business Strategy and Planning including consulting services in the areas of strategic planning, business planning, M&A transaction support, financial due diligence, merger integration, financial analysis, financing strategies, load forecasting, demand-side management, resource planning, and litigation support. Mr. Kemp earned a B.A. *magna cum laude* from Harvard University and a Master of Public Policy from the Goldman School of Public Policy at the University of California at Berkeley, with a focus on energy policy. Prior to joining Black & Veatch in 2003, he co-founded and served as a Managing Director of Economists.com, a management consultancy focusing on financial and technology issues in the power, gas, and water industries. He was responsible for Economists.com's strategic direction, sales and marketing leadership, alliance development, client relationship management, and direct services to clients.

His previous consulting experience was primarily with Deloitte Consulting. From 1986 to 1999, he held positions of increasing responsibility in that firm's management consulting practice in the energy industry, ultimately serving as one of three managing partners for the worldwide practice. He was energy industry leader for the Asia-Pacific-Africa region, and before that the western U.S. region. His experience includes advisory roles in the competitive restructuring of the power industry in a number of countries, including the United States, Australia, New Zealand, United Kingdom, Singapore, the Philippines, Turkey, and China. He advised energy clients on numerous M&A transactions, served on Deloitte's Global Steering Committee for its M&A practice across all industries, and led development of major portions of its M&A methodology.

Deloitte Consulting was involved in synergy estimation and transaction support for most of the utility mergers consummated in the U.S. in the 1990 to 2004 period. His experience includes advice or analysis on the following publicly announced enterprise-level utility M&A transactions: PacifiCorp-Utah Power & Light, Puget Sound Power & Light-Washington Energy, Pacific Enterprises-Enova, Public Service Company of Colorado-Southwestern Public Service, Washington Water Power-Sierra Pacific Resources, AGL Resources-NUI, Exelon-PSEG Enterprises, PacifiCorp-Powercor, Texas Utilities-Eastern Energy, Australian Gas Light-Natural Gas Corp of New Zealand, Transalta New Zealand-Southpower, and Singapore Power-GPU PowerNet.

He has also reviewed synergy data on numerous other transactions, and has advised on many energy M&A transactions for specific assets, as well as many potential utility enterprise transactions that were not publicly announced. He has also held positions as Wholesale Rate Engineer for Pacific Gas & Electric Company, Regulatory Cost Analyst for Southern California Edison Company, Research Specialist for Lawrence Berkeley Laboratory in the U.S. Department of Energy, and Regulatory Economist for the President's Council on Environmental Quality, Office of the White House.

He has not testified previously before the Missouri Public Service Commission, but has testified as an expert witness or prepared expert witness testimony before federal and state regulatory agencies in the U.S., the U.S. International Trade Commission, and civil courts, and presented on energy policy issues to numerous governmental bodies outside the U.S.

172. "Costs to achieve" refers to those costs necessary to ensure the merger is completed, synergy savings are achieved and the merger process is effective. Costs to achieve can be categorized into two types: (i) costs to consummate the merger, also known as transaction costs, and (ii) transition-related costs attributable to integrating Aquila into Great Plains' operations.[265]

Black & Veatch, an employee-owned company, is a leading global consulting, engineering, and construction company, focusing on the power and water industries. Founded in 1915 and headquartered in Overland Park, Kansas, Black & Veatch maintains more than 90 offices worldwide. Black & Veatch was ranked in 2006 by the Engineering News Record as the number 1 company worldwide in generation engineering and Engineering/Procurement/Construction ("EPC"), and as the number 2 company in North America in engineering and EPC for electricity transmission and distribution. Its consulting practice is very active in the areas of regulations and mergers/acquisitions. Collectively, Black & Veatch's team of industry experts has submitted testimony in well over 1,000 proceedings before the Federal Energy Regulatory Commission, state regulatory commissions and other regulatory bodies, licensing and sitting boards, U.S. state and local legislative bodies and investigative panels, and civil and bankruptcy courts. Black & Veatch's Business Strategy and Planning practice has advised on technical and economic issues at least 500 M&A transactions and greenfield projects in the electricity industry.

To assist with developing his testimony Mr. Kemp drew from his base of experience in performing synergy estimation and due diligence projects for other clients, and analyzed information from a number of sources that were relevant to the issues including:

• Selected Missouri and Kansas regulatory precedents on utility mergers;

• KCPL's synergy estimates and supporting workpapers, both as originally filed and as updated;

• Data gathered through interviews with KCPL team leaders in the synergy estimation process;

• Base year (2006) costs for KCPL and Aquila;

• Announced and realized synergies in similar utility merger transactions since 1995; and

• Testimony on merger synergies in other approved utility mergers.

[265] GPE/KCPL Exh. 29, **Wright Direct**, pp. 3-4; GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 2; GPE/KCPL Exh. 31, **Zabors Supp. Direct**, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

Lori A. Wright earned a Bachelor of Business Administration degree in Accounting from the University of Iowa in 1985 and a Master of Business Administration degree from the University of Iowa in 1989. She is a Certified Public Accountant and was originally employed at KCPL in 2001 as Assistant Controller and became Controller in 2002. From 1990 to 2001 she held various accounting positions at Central and South West and American Electric Power (Central and South West was acquired by American Electric Power in 2000), and from 1986 to 1990, she held various accounting positions at Iowa Electric Light and Power Company. She has testified in prior proceedings at the Commission and the Kansas Corporation Commission.

Robert T. Zabors is a partner with Bridge Strategy Group LLC, a management consulting firm based in Chicago. He leads the firm's energy and utilities practice. He graduated from

173. The two components of the costs to achieve, transaction and transition costs, were originally estimated to be approximately $181 million.[266] After the merger plan was revised, Transaction Costs to Achieve dropped to $64.9 million and Transition Costs to Achieve decreased to $58.9 million, the total now being $123.8 million.[267]

Northwestern University in 1985, and received an MBA from the University of Chicago, with a concentration in Business Economics. He has spent approximately 20 years in management consulting, primarily serving electric and gas utilities on a wide range of strategic and operational issues. Representative engagements include corporate and business unit strategy, acquisitions, process improvement, cost reduction, organizational redesign, regulatory strategy, alliances and joint ventures. His specific experience with Great Plains includes supporting the development of the Great Plains strategic intent and the Comprehensive Energy Plan of KCPL. While at Bridge Strategy Group, he has written articles for industry publications such as Public Utilities Fortnightly and Electric Perspectives. Prior to Bridge Strategy Group, he had been a consultant with three consulting firms, Renaissance Worldwide, Booz Allen & Hamilton, and Planmetrics.

[266] GPE/KCPL Exh. 20, **Marshall Direct**, pp. 2-5; GPE/KCPL Exh. 30, Zabors Direct, pp. 13-19 and Schedule RTZ-2.

John R. Marshall is employed by Kansas City Power & Light Company ("KCPL") as Senior Vice President, Delivery Division. He oversees Customer Operations, Transmission Services, Information Technology and Energy Solutions. He graduated from the University of Arkansas at Fayetteville in 1976 with a Bachelor of Science degree in Electrical Engineering. Further education from 1990 through 1997 includes management development at Columbia University, The Aspen Institute, The Wharton School, and Harvard Business School Advanced Management Program. He began employment at KCPL in May 2005. Prior to joining KCPL, he was a Senior Executive Resource for GFI Energy Ventures LLC; Chairman of InfraSource Services Inc.; Chairman of SPL World Group Inc.; and a Director of Power Measurement Holdings, Inc. From 2001-2002, He was Senior Vice President of Customer Service at the Tennessee Valley Authority, and from 1999-2001, he served as President of Duquesne Light Company, Pittsburgh, Pennsylvania. Prior to joining Duquesne Light, he was Vice President of Entergy Corporation and served in various nuclear and fossil generation, transmission, distribution, customer service, information services, and retail operations positions from 1976 through 1999. He has testified before the Missouri Public Service Commission, the Kansas Corporation Commission, and the Texas Public Utility Commission.

[267] GPE/KCPL Exh. 37, Bassham Additional Supp. Direct, p. 5. Transcript, pp. 1676-1677. For changes in the merger plan see EFIS Docket Number 386, *Identification of Evidence that is No Longer Relevant to the Joint Application*, filed by Great Plains and KCPL on May 9, 2008, pursuant to the Commission's order, EFIS Docket Number 313, Order Directing Identification of Irrelevant Evidence, effective April 18, 2008; EFIS Docket Number 234, *Motion for Leave to File Additional Supplemental Direct Testimony and Notice of Withdrawal of Certain Regulatory Plan Requests*, filed February 25, 2008 by Great Plains and KCPL. Although the original cost estimates have changed with the new proposal, the original transaction and transition costs specifically consisted of: (1) Position costs/Severance; (2) Position costs/Share of executive change in control ("CIC") and CIC tax gross-up **This item has changed in association with the revised merger plan; (3) Position costs/Rabbi Trust **This item has changed in association with the revised merger plan; (4) Position costs/Retention; (5) Position costs/Restricted stock and stock options; (6)

174. Examples of transaction costs include investment banker fees, consulting and legal fees associated with the evaluation, bid, negotiation and structure of the deal. [268]

175. Transition-related costs are comprised of the costs incurred to integrate Aquila into Great Plains. They are those costs necessary to ensure that the synergy savings are achieved and that the merger process is effective. These costs include severance and retention costs and costs associated with process integration.[269]

176. In the original merger plan the Missouri Jurisdictional Transaction Costs were approximately $69.3 million and the Missouri Jurisdictional Transition Costs were approximately $33.0 million.[270]

Process integration costs and benchmarking; (7) Legal and Human Resources; (8) Costs to maintain support services for Black Hills; (9) Integration team; (10) Transaction costs; (11) Incremental debt tender costs – **This item has changed in association with the revised merger plan; (12) Other/Directors and Officers liability tail coverage; (13) Other/Regulatory process costs; (14) Other/Facilities integration; and, (15) Other/Internal and external communications. GPE/KCPL Exh. 30, Zabors Direct, pp. 13-19, and Schedule RTZ-2; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5.

See GPE/KCPL Exh. 30, Zabors Direct, pp. 13-19, and Schedule RTZ-2; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5; GPE/KCPL Exh. 37, Bassham Additional Supplemental Direct, pp. 4-6; GPE/KCPL Exh. 39, Giles, Additional Supplemental Direct, pp. 1-6 and Schedule CBG-1. The sharp reduction in transaction costs is related to the Applicants withdrawal their requests to recover; (1) $35 million in Debt Tender Costs associated with refinancing and retiring Aquila's existing debt obligations; (2) change-in-control costs associated with Aquila's senior management, including change-in-control payments and the tax "gross up" thereof, and including the funding of the rabbi trust, representing Aquila's supplemental executive retirement plan, i.e. $16.7 million with a Missouri jurisdictional amount of $12.2 million; and, (3) the re-categorization of certain severance payments from transaction costs to transition costs, i.e. $13.6 million with a Missouri jurisdictional amount of $9.9 million. *Id*. See also GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 8; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 14-15. Transcript, p. 1223, 1422-1423.

[268] GPE/KCPL Exh. 29, Wright Direct, p. 4; GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 2; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

[269] GPE/KCPL Exh. 29, Wright Direct, p. 4; GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 3; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

[270] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and Schedules RTZ-10-11; GPE/KCPL Exh. 37, Bassham Additional Supplemental Direct, pp. 4-6; GPE/KCPL Exh. 39, Giles, Additional Supplemental Direct, pp. 1-6 and Schedule CBG-1. See also GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 8. Transcript, pp. 1223, 1303-1305, 1715-1716.

177. After the merger plan was revised, the Missouri Jurisdictional Transaction Costs dropped to $47.2 million, and the Missouri Jurisdictional Transition Costs increased to $42.8 million.[271]

178. The changes in Missouri Jurisdictional costs occurred because (1) the change-in-control costs for Aquila's senior management, including certain payments, taxes, and additional trust funding of the executive retirement plan were eliminated, reducing transaction costs by $16.7 million (Missouri jurisdictional amount by $12.2 million); and, (2) certain severance payments were moved from transaction to transition costs, thereby reducing transaction costs and increasing transition costs by $13.6 million (Missouri jurisdictional amount by $9.9 million).[272]

179. Great Plains anticipates that all costs to achieve the merger will be incurred by 2012, with over 95% of estimated costs incurred by 2009.[273]

180. The Applicants request that the costs to achieve the merger be allocated to Great Plains' various regulatory units (KCPL, Aquila and St. Joseph Industrial Steam), booked as a regulatory asset and amortized into cost of service over five years, beginning on January 1, 2008, or the month immediately following consummation of the merger, whichever occurs later.[274]

2. Synergy Savings

181. "Synergy savings" refers to reductions in costs from combining Great Plains and Aquila as compared to the combined costs of the entities standing alone.[275]

182. Examples of synergy savings include benefits of scale, improved efficiency in support functions, economies of scale in purchasing, and savings from combining customer service and field operations in the same geographic area.[276]

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[271] GPE/KCPL Exh. 37, Bassham Additional Supp. Direct, p. 5; Transcript, pp. 1303-1305, 1406,1715-1716.

[272] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 15-15 and Schedules RTZ-10-11; GPE/KCPL Exh. 37, Bassham Additional Supplemental Direct, pp. 4-6; GPE/KCPL Exh. 39, Giles, Additional Supplemental Direct, pp. 1-6 and Schedule CBG-1. See also GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 8. Transcript, p. 1223, 1303-1305, 1422-1423.

[273] GPE/KCPL Exh. 30, Zabors Direct, pp. 13-19 and Schedule RTZ-2.

[274] GPE/KCPL Exh. 29, Wright Direct, p. 4.

[275] *Id*.

[276] *Id*. at pp. 4-5; GPE/KCPL Exh.20, Marshall Direct, pp. 2-5.

183. Utilities in the U.S. typically use a common typology to classify merger synergies. The categories are created, enabled, and developed synergies.[277]

184. Created synergies are those cost savings or revenue enhancements that are directly attributable to the transaction. They would not occur but for the transaction. The savings are driven by achievement of scale economies and consolidation of redundant functions.[278]

185. Examples of created synergies include consolidation of corporate back office functions (finance, human resources, information technology, etc.), call center consolidation, field support center consolidation, and integration of generation dispatch.[279]

186. Enabled synergies are those cost savings or revenue enhancements that are facilitated or unlocked by merger. The transaction makes them much more accessible and achievable, but the tie to the merger is not definitive. This type of synergy often involves transferring skills between companies or applying one company's superior practice across both companies. It could also entail leveraging the combined companies' larger scale into a level of benefit greater than the sum of what either company could achieve separately.[280]

187. Examples of enabled synergies include transfer of better operations or maintenance practices (generation, transmission, distribution), migration to the better information technology platforms, or achieving lower supply chain costs through increased leverage over vendors.[281]

188. Developed benefits are not synergies. They are cost savings or revenue enhancements that occur during the merger time frame, but are not directly related to merger.[282]

189. Developed benefits can be achieved without a merger. Because the merger environment does not confer any advantage;

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[277] GPE/KCPL Exh. 18, **Kemp Supp. Direct**, pp. 1-28; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[278] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[279] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

[280] *Id*.; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[281] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

[282] *Id*.; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

development benefits typically carry greater execution risk than created or enabled synergies. [283]

190. Examples of developed benefits would include financial restructuring, business process re-engineering, or organizational redesign.[284]

191. Neither Aquila nor KCPL addressed developed benefits.[285]

192. As incorporating developed benefits is not appropriate, the management of Aquila and KCPL properly excluded them from potential merger synergies.

a. Methodology for Synergy Calculations

i. Due Diligence

193. For the due diligence phase of the synergy valuation, a team of 20 KCPL senior executives spent three months developing a top-down estimate of synergy potential and building integration plans for the key areas of the business.[286]

194. The top-down analysis involved: (1) Assessing the strategic implications of the merger; (2) Estimating potential ranges of values for the transaction using comparable metrics from numerous mergers and acquisitions in the electric utility sector; (3) Identifying potential areas of synergy and estimating potential value ranges through the application of benchmarks; (4) Establishing multiple teams focused on operations and corporate center that analyzed the available information to further refine the synergy analysis; and (5) Utilizing these teams to build preliminary integration plans that would provide the basis for future integration.[287]

195. Upon completion of the preliminary bid and prior to the public announcement of the merger, Aquila and KCPL worked together to review the analysis and jointly agreed on key principles such as synergy potential.[288] This high level of analysis and collaboration ensures that the companies will meet their commitments to customers in terms of synergies and service quality.[289]

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[283] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[284] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[285] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*. Transcript, p. 1524, lines 7-12.

ii. Integration Teams

(a) Overview

196. After the merger was publicly announced in February 2007, integration planning efforts expanded to include more than 20 integration teams and 150 employees of both KCPL and Aquila.[290]

197. The integration team process is similar to the due diligence process to develop synergy savings estimates in that the underlying approach was to build the operating model and cost basis for the combined operations. This process involves a bottom-up perspective by managers who would likely run the combined operation, balanced by frequent cross-functional and executive reviews.[291]

198. In using employees from both companies to develop and validate the synergies, the synergy projection is more robust and accurate than typical valuations conducted during merger analyses.[292]

199. The joint-company teams were also involved in a thorough, bottom-up analysis to identify material opportunities for creating operational and financial value. A bottom-up analysis involves a detailed assessment whereby the projected headcount and costs for the companies were developed through detailed analyses.[293]

200. Following the shareholder approvals received in October, integration planning teams moved to the next phase of planning efforts in anticipation of the transaction close. In addition to increasing both the frequency and level of activity, the shareholder vote gave the teams from both companies greater access to each other's information.[294]

201. All synergy projects were tested and validated at multiple levels within both companies.[295]

202. The Integration Planning Leadership Team ("IPLT") assessed all potential synergies to ensure that they met the definition of

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[290] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. See in particular Schedules JRM-5 and JRM-6. There were 26 different sub-teams. Transcript, pp. 1423-1424.

[291] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12.

[292] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[293] *Id*. For example, teams built models of their go-forward organizations and used actual salary data to build labor cost projections. And, the teams have focused on ensuring that successful operations are achieved at Day 1. *Id*.

[294] *Id*.

[295] *Id*.

a synergy. Also, both companies filed two separate joint proxies in which both companies agreed to the identified synergies.[296]

203. The joint teams used direct analysis of synergies rather than the estimates and comparison that are sometimes used in other transactions.[297]

204. As the integration planning progressed, KCPL worked to address integrated combined operations in its 2008 business planning process. As such, the goals, strategies, tactics, and metrics identified to achieve successful operations included both core KCPL operations and the incremental Aquila operations.[298]

205. To ensure that an evaluated project qualified as a synergy, KCPL utilized a rigorous process. First, all teams were offered definitions of what constitutes a synergy. Second, KCPL employees from the regulatory and finance areas met with each team on a periodic basis to review synergy ideas for appropriateness and to ensure accurate valuation. Third, all synergies were tested in IPLT peer review sessions.[299]

206. KCPL was supported with outside experts versed in the areas of identifying potential synergies and opportunity valuation during the whole process. These experts included Mr. Robert Zabors of Bridge Strategy Group for synergy identification and analysis; Wallace Buran for identification of supply chain opportunities; William Kemp for synergy and process validation and support; and Robert Steinke for plant operations/generation support and synergy identification. These outside resources provided an additional level of support for the synergy projections and merger value.[300]

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[296] *Id*.
[297] *Id*.
[298] *Id*.
[299] *Id*. To demonstrate this review process, the IPLT evaluated a potential synergy project whereby value would be created by installing environmental controls at Aquila's Sibley generating station and selling the incremental allowances. In this case, the IPLT, with input from Aquila, determined that this was not a synergy because Aquila had the ability to do this modification in the course of its normal business. As such, the IPLT modified its plans to recognize that Aquila had already accounted for capital needs for this project. *Id*.
[300] *Id*.; Transcript, p. 1521; See generally the prefiled and live testimony of Robert Zabors, GPE/KCPL Exhs. 30 and 31, Transcript, pp. 2888-2928; **Wallace Buran**, GPE/KCPL Exh. 6, Transcript, pp. 1532-1549; William Kemp, GPE/KCPL Exhs. 18-19, Transcript, pp. 1007-1076; **Robert Steinke**, GPE/KCPL Exh. 26, Transcript, pp. 1569-1570.
Wallace P. Buran is a consultant for Bridge Strategy Group LLC, who is under contract to KCPL to support the integration planning process. His responsibilities encompass facilitating the discussion and analysis of the supply chain processes and activities,

(b) Specifics of the Integration Planning Process

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materials acquisition, materials recovery and salvage and fleet acquisition and maintenance areas of the two companies to support the integration planning teams. He received both a Bachelors in Industrial and Systems Engineering and a Masters in Industrial Engineering from the Georgia Institute of Technology. He has worked for General Motors as a Production Foreman, Avon Products as a Distribution Supervisor, Theodore Barry and Associates as a Partner in the Utility Practice, Advanced Management Concepts as President, Deloitte Consulting as a Partner and National Director, WorldCrest Group as Chief Executive Officer, IBM as the Global and Americas Leader of Operations Strategy Consulting, Monitor Group as a Practice Leader of the Activities, Processes and Systems Group, and Supply Chain Frontiers Institute as the Managing Director. During his career, he has served over 20 Electric Utilities in the Generation, Customer Service, Distribution and Transmission, Fuels and Power Supply areas. He has consulted with and/or served as a supplier to: Southern Company, Arkansas Power & Light, Jacksonville Electric, Florida Power and Light, Carolina Power and Light, Consolidated Edison, South Carolina Gas and Electric, Southern California Edison, Oklahoma Gas and Electric and Dayton Power and Light.

Robert F. Steinke is an independent consultant employed by Bridge Strategy Group L.L.C., a management consulting firm based in Chicago. He graduated with a degree in Mechanical Engineering from Steven's Institute of Technology in 1958 and attended the Program for Management Development at the Harvard Business School in 1980. He is the President of Robert F. Steinke & Associates, a consulting firm specializing in power generation management and operation. He has more than 48 years of consulting and industrial experience serving the power industry worldwide. For the last 16 years he has specialized in analyzing and making recommendations in the area of power plant operation and management effectiveness, conducting in-depth power plant analysis evaluation programs for over 250 fossil and gas-turbine power plant units worldwide. Prior to founding Robert F. Steinke & Associates, he was a Vice President at Public Service Electric and Gas Company ("PSE&G"). He served as a Corporate Officer for five years, managing the Business and Technical Support department and the Fuel Supply department. Prior to that, he served as General Manager Fossil Operations managing and directing the overall operation, maintenance, and control of seven major fossil power plants and 49 gas turbine units. He also served in many managerial and supervisory capacities at PSE&G, for more than 27 years in the Electric Production department.
Mr. Steinke conducted in-depth onsite inspections and analysis of the following Aquila operations: Lake Road power plant, Sibley power plant, all gas turbine operations, facilities, engineering, support group, and various other management and executive personnel. At KCPL, he conducted detailed analysis of: central maintenance facility, turbine overhaul support group, fuel supply organization, construction support group, and various other management and executive personnel. He conducted a detailed on-site inspection, investigation, and analysis of Aquila's entire generation fleet, and in this process conducted over 75 detailed interviews with management, staff, and employees. He reviewed many documents and a considerable amount of historical data. He conducted detailed three-hour plant inspection investigations of each facility, and participated in a number of plant Operations Integration Team meetings with both Aquila and KCPL staff

207. Many of the integration teams were led by individuals involved in the due diligence process.[301]

208. The major differences between the team process and the due diligence process consisted in the number and level of involvement of people across the organizations and the ability to share and discuss information across the larger team and with members of Aquila.[302]

209. There was extensive involvement from both Aquila and KCPL management and employees in integration planning. At the leadership level, there were ten employees named as team leaders from KCPL, and fourteen employees from KCPL on subteams. A similar number of employees from Aquila were named to the teams.[303]

210. In order to accurately determine synergy savings from the integration of the companies, four goals were articulated by KCPL management for the integration planning process beginning on the morning of the merger announcement, February 7th, 2007:[304]

(1) Capture the value of the deal;
(2) Position for sustainable Tier 1 performance;
(3) Prepare for Day 1 and transition to steady state; and
(4) Continue to successfully manage operating businesses.

211. These goals provided direction to those involved with integration planning, and reinforced the importance of maintaining operating performance through a long transition.[305]

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[301] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12.
[302] *Id*. Information was shared within guidelines established by the legal departments. In several areas, such as Generation and Power Marketing, the teams did not have access to all data due to restrictions at this stage of the approval process, which would have helped refine the analysis. *Id*.
[303] *Id*. The project structure is depicted in Schedule RTZ-5. Bridge Strategy Group helped to structure the process, facilitate group discussions, coordinate project management activities, and, as needed, support analyses of the teams. Bridge Strategy Group supported the development of synergy savings as they relate to the integration of operations and support services of the two companies, the transition with Black Hills Corporation, and activities for the merger approval process. *Id*. See also Transcript, pp. 1423-1425.
[304] *Id*.
[305] *Id*. Another goal embodied in this process, from KCPL's perspective of building a successful culture for the combined operations, is KCPL's desire to ensure that activities

212. "Tier 1 performance," as articulated in goal number 2, is a performance standard that KCPL uses to indicate operating performance in the top quartile of a relevant peer group. The broader connotation is a process of understanding benchmarks and best practices and incorporating them as appropriate to continuously improve business performance.[306]

213. "Day 1," as used in goal number 3, refers to the first day of operation of the combined entities.[307]

214. There are six steps in the integration planning process, which covers the timeframe from merger announcement (February 7, 2007) until Day 1 operations. The steps are:[308]

(1) Launch Integrations Teams;
(2) Develop Common Understanding;
(3) Design the Path to Tier 1;
(4) Launch Key "Enabler" Activities;
(5) Develop Integration Plans and Materials; and
(6) Prepare Day 1 Plans**.**

215. Templates were developed to assist teams and project management with consistency and completeness.[309]

216. The templates were customized for each step of the process and made available on a common site. For example, financial templates were developed to aggregate budget information and evaluate synergy projects. Operational templates were developed to structure discussions on organization, processes, and information technology ("IT").[310]

217. KCPL's current Economic Value Added ("EVA") project assessment model was used across teams to assess benefits of synergy projects.[311]

218. KCPL management held weekly meetings with its team leaders to ensure appropriate progress and identification of relevant issues.[312]

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and decisions were consistent with KCPL's cultural standards and aspirations. For purposes of the merger integration teams, that implies attributes such as collaboration, engagement, respect, leadership and integrity. *Id*.

[306] *Id*.

[307] *Id*.

[308] *Id*.

[309] *Id*.

[310] *Id*.

[311] *Id*.

219. A project steering team, which included Aquila leadership, met every other week.[313]

220. Several forums were created to gather input from across the companies to help identify issues. KCPL executives visited every Aquila and KCPL location to discuss the integration with employees. The company intranet contained coverage and included the ability to post questions on the site. A monthly Integration Insights newsletter was published to communicate to employees of both companies, and also shared with Black Hills Corporation. Team leaders and other KCPL executives made frequent visits to Aquila to promote interaction and understanding.[314]

221. The functional teams, comprised of Great Plains and Aquila employees, worked together to determine the incremental resources (expenses, capital, and positions) required in their functional area post-merger close.[315]

222. The incremental resources were compared to the baseline Aquila resources to determine the estimated amount of synergies.[316]

223. The baseline selected for calculating the savings was Aquila's 2006 non-fuel operating and management expense ("non-fuel O&M") and the capital plan issued in November 2006.[317]

224. The baseline of non-fuel O&M expense level, based on 2006 actual spending, was chosen by KCPL and Aquila to ensure the synergies proposed to be shared with customers were consistent with the costs currently included in Missouri rates.[318]

225. The level of 2006 actual spending was determined in Aquila's most recent rate order at $151 million (Missouri jurisdictional).[319]

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[312] *Id*. See specifically Schedule RTZ-5.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] *Id*.
[317] GPE/KCPL Exh. 30, Zabors Direct, pp. 6-13 and Schedule RTZ-1; GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12; GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5; GPE/KCPL Exh. 22, Marshall Surrebuttal, p. 9.
[318] *Id*. Subsequent to the announcement of the merger, Aquila received final rate orders in both of its Missouri electric jurisdictions. The Missouri costs that were the foundation for the Orders in those cases were compared to 2006 actual information that was allocated to the Missouri jurisdictional operations. In collaborative reviews with Aquila, the two sets of data were seen as consistent. *Id*.
[319] *Id*.

226. Detailed information regarding baseline non-fuel O&M expense level was provided to KCPL by Aquila and allocated to each of the integration planning teams.[320]

227. When the 2006 actual budgets were received, early in the integration planning process, an initial allocation of the costs was made to each Integration Planning team based on their defined scope, as mapped to the current KCPL organization. The initial allocation was then reviewed by each team to ensure that they were addressing the proper cost base and had properly defined their scope.[321]

228. Each integration team project provided a net synergy calculation. This calculation nets the synergy benefit against all costs including capital costs and costs to achieve.[322]

229. The synergies from each team were then combined to determine the total estimated synergies resulting from the transaction.[323]

230. The teams determined synergies over a five year period, with a pro forma start date of January 1, 2008, although the teams assumed the actual merger close date would be some time in the first quarter of 2008.[324]

231. Because the majority of synergies continue over time, those synergies were escalated by 3.1%, which is the 3-year average of the consumer price index for utilities (CPI-U). This is a conservative assumption relative to more recent CPI figures.[325]

b. Calculated Synergy Savings – Summary

232. Operational synergies identified in due diligence pointed to $264 million over a five-year period ending 2012.[326]

233. Synergies increased with the functional team analysis when compared to the estimates developed in due diligence.[327]

234. The functional team analysis of operational synergies determined there were $305 million in operational synergy savings, exceeding estimates from due diligence by $41 million. A direct

[320] *Id*.
[321] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12.
[322] *Id*. Details on specific projects are included in the testimony of several KCPL witnesses, including John Marshall, William Herdegen, Dana Crawford and Kevin Bryant. *Id*.
[323] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12.
[324] *Id*.
[325] *Id*.
[326] *Id*.
[327] *Id*.

comparison between the two reveals that projects relating to non-fuel O&M or revenue/purchased power were not reported separately in due diligence.[328]

235. Due to the nature of the bottom-up projections, anticipated cost increases were reflected in specific budget line items within business areas instead of applying a single escalation factor to all items.[329]

236. The expenses were projected on a quarterly basis for 2008 and an annual basis thereafter, so the bottom-up estimates would be far more reflective of actual conditions than applying a standard escalation.[330]

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[328] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12. See Schedule RTZ-6 in particular. Additionally, Schedule RTZ-8 enables a functional team analysis comparison to due diligence, which was categorized as operations (including customer service) and services. See also GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, p. 3. Transcript, pp. 275.

[329] GPE/KCPL Exh. 30, Zabors Direct, pp. 6-13 and Schedule RTZ-1; GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5.

[330] *Id*.

237. Five- year synergy detail is depicted as follows:[331]

Schedule RTZ-8: Five year Synergy detail

Non-Fuel O&M (NFOM)		2008	2009	2010	2011	2012	Cumulative
	Operations	6	8	10	10	11	44
	Shared Services	2	8	10	11	12	42
		8	16	19	21	22	87
NFOM Projects	Facilities Consolidation	1	1	1	2	2	7
	AMR	0	0	(1)	2	4	5
	20 W. 9th						
	Consolidation	1	1	1	1	1	6
	Rate Base Change	0	4	4	4	4	16
		1	6	6	9	11	33
Supply Chain	Sourcing and Best Practices Spend Management	12	15	16	17	18	78
	Inventory	0	1	1	2	2	6
	Fleet	1	3	3	3	3	13
	Avoided Cost of Capital	1	3	6	10	14	33
		15	22	27	31	36	131
Revenue Projects	Billing Enhancements	2	3	3	3	3	13
	Energy Efficiency	1	2	2	4	5	13
	Heat Rate	(0)	(0)	0	0	0	1
	CT Optimization	0	1	1	1	1	3
	Sibley 1 and 2 Optimization	0	0	0	0	0	2
	Sibley 3 Optimization	1	5	3	4	3	17
	Boiler Tube Improvement	1	2	1	1	1	6
		6	12	10	13	13	54
Utility Total	Total	30	56	62	75	82	305

238. The functional teams expect synergies to extend beyond the five-year period. In addition, KCPL is investing in multiple areas in which the value of the synergy will provide increasing levels of value after the five-year period.[332]

239. To quantify the value of synergies beyond the five-year period, if the synergies in year five are escalated at the inflation rate through year ten, the total synergies created would total $755 million.[333]

[331] GPE/KCPL Exh. 31, Zabors Supp. Direct, Schedule RTZ-8.

[332] GPE/KCPL Exh. 30, Zabors Direct, pp. 6; GPE/KCPL Exh. 21, Marshall Supp. Direct, pp. 5-6.

[333] GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 (See p. 8 in particular) and accompanying schedules excluding RTZ-12. Operating expenses related to the savings are included in these figures. And the projects (non-fuel O&M and purchased power) included

240. These amounts represent total savings. On a Missouri jurisdictional basis, total synergies are equal to $549 and $222 million for ten and five years, respectively.[334]

241. All amounts shown in Findings of Fact Numbers 227-233 above represent projected savings directly attributable to the merger.[335]

c. Calculated Synergy Savings – Components

242. With regard to the specific components comprising the general categories of synergies described generally in Findings of Fact Numbers 227-233, the Commission has received extensive, detailed pre-filed testimony from the following witnesses: Buran, Cheatum, Crawford, Kemp, Herdegen, Marshall, Steinke, Tickles, Van Dyne, and Zabors.

243. On May 9, 2008, pursuant to the Commission's order, the Applicants identified specific portions of the prefiled testimony of witnesses Kemp, Marshall and Zabors in relation to synergy savings that were no longer relevant to the merger proposal because of the proposal's revisions.[336] Those irrelevant portions are as follows:[337]

William Kemp – Supplemental Direct Testimony (Hearing Exhibit No. 18)

a. Page 4, line 22 – page 5, line 1 ("I will not address … to this transaction.");
b. Page 5, lines 9-10 (in entirety);
c. Page 24, lines 1-18 (in entirety);
d. Page 26, lines 6-10 ("from KCPL's proposal … through to customers.");
e. Page 26, line 10-11 ("after 2012");
f. Page 26, line 11 ("also");
g. Page 27, lines 1-2 (in entirety); and
h. Page 27, line 18 – page 28, line 2 (in entirety).

William Kemp – Surrebuttal Testimony (Hearing Exhibit No. 19)

a. Page 2, lines 14-22 (in entirety).

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a fixed charge for capital. *Id*. See also GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, p. 3.

[334] GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, p. 3.

[335] GPE/KCPL Exh. 30, Zabors Direct, pp. 6-13 and Schedule RTZ-1; GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5. In addition, both Aquila and KCPL had previously undergone significant cost reduction and efficiency efforts and had reflected resulting savings in their respective "stand-alone" company projections. *Id*.

[336] See *Identification Of Evidence That Is No Longer Relevant To The Joint Application*, filed on May 9, 2008. EFIS Docket Number 386.

[337] *Id.*

John Marshall – Direct Testimony (Hearing Exhibit No. 20)

a. Page 3, line 20 – page 4, line 4 (in entirety).

John Marshall – Surrebuttal Testimony (Hearing Exhibit No. 22)

a. Page 6, lines 16-22 (in entirety); and
b. Schedule JRM-8, Title ("with customers capturing 80% of the value"). Also, because the Applicants have withdrawn their request for approval of a synergy sharing mechanism, the designation of benefits flowing to "KCPL" and "Customers" in the bar graph and accompanying table in Schedule JRM-8 is no longer relevant. The "Total" figures depicted in the bar graph and chart, on the other hand, continue to be relevant.

Robert Zabors – Direct Testimony (Hearing Exhibit No. 30)

a. Page 12, lines 6-9 (in entirety);
b. Page 14, lines 8-10 (in entirety); and
c. Schedule RTZ-1, the row labeled "Interest."

Robert Zabors – Supplemental Direct Testimony (Hearing Exhibit No. 31)

a. Page 8, lines 16-18 ("Of that, net … $341 million."); and
b. Schedule RTZ-12: Because the Applicants have withdrawn their request for approval of a synergy sharing mechanism, the designation of benefits flowing to "GPE" and "Customers" in the table on Schedule RTZ-12 is no longer relevant. The "Total" figures, on the other hand, continue to be relevant.

244. The Commission finds the sections of witnesses Buran, Cheatum, Crawford, Kemp, Herdegen, Marshall, Steinke, Tickles, Van Dyne, and Zabors prefiled testimony that provide the component analyses of the over-all synergy calculations (with the exclusion of the irrelevant materials identified in finding of Fact Number 236) to be accurate and supported by proper methodology. Consequently, the Commission will adopt these portions of witnesses Buran's, Cheatum's, Crawford's, Kemp's, Herdegen's, Marshall's, Steinke's, Tickles', Van Dyne's, and Zabors' prefiled testimony as findings of fact in support of the overall synergy calculations.[338]

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[338] In fact, as other Findings of Fact in this section will describe, this evidence is virtually unconverted. The Commission will not repeat that testimony in its Findings of Fact section, but notes that it is sufficiently identified for the parties in Findings of Fact 235-238.

245. The Commission adopts the following testimony as findings of fact:

a) GPE/KCPL Exh. 6, Buran Supp. Direct, pp. 2-27, and the accompanying schedules;[339]

b) GPE/KCPL Exh. 7, Cheatum Supp. Direct, pp. 2-3;[340]

c) GPE/KCPL Exh. 11, Crawford Direct, pp. 2-6 and GPE/KCPL Exh. 12, Crawford, Supp. Direct, pp. 1-9 and the accompanying schedules;[341]

d) GPE/KCPL Exh. 16; Herdegen Direct, pp. 3-8 and GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22;[342]

e) GPE/KCPL Exh. 20, Marshall Direct, pp. 2-5, GPE/KCPL Exh. 21, Marshall Supp. Direct, pp. 1-22 and GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-11;[343]

f) GPE/KCPL Exh. 26, Steinke Direct, pp. 2-8;[344]

g) GPE/KCPL Exh. 27, Tickles Supp. Direct, pp. 1-6;[345]

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[339] See also Transcript, pp. 1532-1548 (Synergy Savings).
[340] See also Transcript, pp. 1501-1531 (Synergy Savings).
Lora Cheatum is employed by KCPL as Vice President of Administrative Services. Her general responsibilities include Human Resources, Purchasing and Facilities for KCPL. She holds an undergraduate degree from Washburn University in Topeka and an MBA from the University of Kansas. She has held numerous Human Resources positions with both PepsiCo and Wal-Mart since 1986, and joined KCPL on September 11, 2001 as the Director of Human Resources for the Delivery Division and was promoted to Vice President of Administrative Services in March of 2005. She has previously testified before the Commission.
[341] See also Transcript, pp. 1549-1569 (Synergy Savings).
[342] See also Transcript, pp. 2238-2316 (Service Quality, Synergy Savings)
[343] See also Transcript, pp. 1076-1217 (Synergy Savings).
[344] See also Transcript, pp. 1569-1571(Synergy Savings).
[345] See also Transcript, pp. 1572-1579 (Synergy Savings).

Charles H. Tickles is employed by KCPL as the Senior Director of Information Technology. His responsibilities include management and coordination of all corporate information technology business applications, corporate IT architecture and infrastructure including telecommunications. He graduated from the University of Kansas in 1980 with a Bachelor of Science degree in Mechanical Engineering. In 1993, he completed the Edison Electric Institute Senior Middle Management Program and in 2001 he graduated from the Rockhurst University Executive Fellows Program with a Master of Business Administration

h) GPE/KCPL Exh. 28, Van Dyne Supp Direct, pp. 1-5;[346]

i) GPE/KCPL Exh. 30, Zabors Direct, pp. 6-13 and accompanying schedules and GPE/KCPL Exh. 31, Zabors Supp. Direct, pp. 1-15 and accompanying schedules excluding RTZ-12.[347]

246. The Commission further adopts Mr. Kemp's prefiled testimony in its totality as findings of fact (with the exclusion of the irrelevant materials identified in Finding of Fact Numbers 236), but his testimony will also be considered in depth in another portion of this order and additional specific findings regarding his testimony will be made in relation to his testimony at that time.[348]

d. Synergy Sharing versus Synergy Retention

247. As previously noted, synergies were estimated based on a detailed evaluation by the transaction integration teams, including members of Aquila and KCPL management and individuals responsible to achieve the synergies. [349]

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degree. He began employment at KCPL in 1980 as a Grade I Engineer and was promoted to a Grade II Engineer in 1984. Subsequently, he served as Superintendent of Computer Applications from 1984-1988, Manager of Computer Applications from 1988-1994, Manager of System Applications from 1994-1996 and Director of Information Systems from 1996-2000. In 2000, he became Senior Director of Information Technology, the title he holds today**.**

[346] See also Transcript, pp. 1611-1645 (Synergy Savings)

Paul Van Dyne is employed by KCPL as the Director of Compensation and Benefits. His responsibilities include supervision of the compensation, benefits and Human Resources Services groups of the company. He has a BA from Penn State and a MA from the University of Kansas and is a Certified Compensation Professional and a Certified Employee Benefits Specialist. He has 30 years experience in the human resources, compensation and benefits field. He became an employee of KCPL on August 15, 2006. Most immediately prior to this he was the Vice President of Compensation and Benefits for Mutual of Omaha (3 years). Prior to that he was: Director of Compensation for FBD Consulting, Inc. (6 years); Senior Vice President of Personnel for NationsBank/Bank of America (2 years); Director of Compensation and Benefits for American General Finance (14 year); and he held various human resources positions with Payless Cashways, Inc., Realex Corporation and St. Joseph Medical Center in Wichita, Kansas.

[347] See also Transcript, pp. 1400-1430 (Synergy Savings).

[348] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 3-28 and accompanying schedules; GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. See Findings of Fact Numbers 248-315.

[349] GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, pp. 3. See Findings of Fact Numbers 186-224.

248. The amount of synergies or benefits contained in the original request filed on August 8, 2007 has not changed.[350]

249. In February 2008, the Applicants' withdrew their original request concerning synergy sharing stating:

> The Joint Applicants withdraw their request for a specific synergy savings adder and instead propose to utilize the natural regulatory lag that occurs between rate cases to retain any portion of synergy savings. The Joint Applicants believe that this will result in benefits to customers in every year after the close of the transaction. Both Aquila and KCPL will file rate cases in 2008 to include in rate base new environmental plant at Iatan 1 and, in the case of Aquila, to include new environmental plant at Sibley 3. Both Aquila and KCPL will file rate cases in 2009 to include in rate base the newly constructed Iatan 2 generation unit. Synergy savings will be included in the test year cost of service of those rate cases, allocated to all jurisdictions, and flowed through to customers in rates effective in 2009 and 2010. Great Plains Energy proposes to retain only those synergies achieved between rate cases in excess of those synergies previously included in rates.[351]

250. The Applicants revised merger plan proposes to rely on the natural regulatory lag that occurs between rate cases to retain any portion of synergy savings. The traditional ratemaking process will be used so that any merger synergy savings in a test year will be passed through to Aquila and KCPL customers in future rate cases.[352]

e. Synergy Savings Tracking

251. Tracking synergy savings with any degree of accuracy is problematic at best. Business operations are not conducted in a static environment, but rather under constant change, including customer

[350] *Id*.
[351] *Id*. at pp. 3-4. The Applicants originally proposed that KCPL and Aquila be permitted, collectively, to retain fifty percent (50%) of merger-related synergy savings for five years, beginning on January 1, 2008, or the month immediately following the consummation of the merger, whichever occurs last. GPE/KCPL Exh. 29, Wright Direct, p. 5; GPE/KCPL Exh. 1, Bassham Direct, p. 10. Total non-fuel operating synergies were $305 million. After subtracting transition-related costs of $45 million and using the 50/50 synergy sharing ratio, synergy sharing would have been $130 million over five years. GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 8.
[352] Transcript, p. 1219-1220.

growth, technological improvements, etc. Tracking will become more difficult each successive year after the merger.[353]

252. If the Commission requires synergy tracking, the Applicants suggest a simple approach, noting that additional complexity does not improve accuracy. The Applicants suggest establishing base period costs and then comparing each subsequent year's actual costs to the base year costs, as adjusted for inflation. The net decrease in expense would be considered synergy savings.[354]

253. Consideration for known and measurable changes shall be reflected in the synergy savings computation, including cost escalations, such as wage increases and the effects of inflation among others.[355]

254. Applicants recommend 2006 as the base year for synergy savings tracking because that year represents the last full year of operations unaffected by the merger. It is also the test period for Aquila's most recent rate case, Case No. ER-2007-0004, and the test period of KCPL's most recent rate case, Case No. ER-2007-0291. Consequently, the base year of 2006 provides a good test period for both Aquila and KCPL to evaluate synergy savings to be accomplished as a result of the merger.[356]

3. Reasonableness of the Projected Synergies

255. An important measure of the public interest test is the long term effect on rates to customers. Any type of attributable cost or benefit that would be included in the cost basis for regulated rates should be considered in synergy estimates.[357]

256. In general, the operational model for a new entity after the closing of a merger can affect the range of synergies that can be accessed. If the utilities' service territories are geographically separated by a significant distance (e.g., AEP-C&SW or MidAmerican-PacifiCorp), many types of synergies in generation, transmission, and distribution operations may not be accessible. Similarly, if the new entity plans to maintain substantial corporate separation between the predecessor companies (with their own management teams, headquarters

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[353] GPE/KCPL Exh. 29, Wright Direct, p. 5; GPE/KCPL Exh. 1, Bassham Direct, p. 10;
[354] *Id*.
[355] GPE/KCPL Exh. 29, Wright Direct, p. 6.
[356] *Id*. at pp. 6-7.
[357] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

facilities, etc.), some elements of back office synergies may not be accessible.[358]

257. The post-transaction operational model planned by Great Plains will allow the full range of synergies to be accessed. One of the major drivers of synergy benefits for this transaction is the geographic proximity of the two companies' utility operations. Their service territories form a compact, contiguous area. There is no geographic barrier to accessing the full range of synergies.[359] This proximity enhances synergy potential as the overlap in operations results in similar operating models and fossil fuel generating fleets, the Corporate centers are within a few blocks of one another, the companies share common values, numerous employees have worked for both companies and employees of both companies have worked together on numerous industry and community ventures.[360]

258. KCPL and Aquila formed joint teams of internal experts around each of their major operational functions. These teams followed the same general steps in developing their synergy estimates:[361]

a. Define the scope of their functional area, resolve any boundary issues with other teams, and establish sub-teams to address sub-functions in more detail.

b. Establish the base 2006 costs related to their area, and document the existing business processes.

c. Review the combined level of expected business activity in their assigned functions, and the combined resource level (labor and non-labor).

d. Define the operating model for the combined function, and estimate savings from its implementation. In most cases KCPL's operating model was extended conceptually to cover the

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[358] *Id*.
[359] *Id*.; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[360] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. This analysis revealed that Great Plains' synergy estimates showed significantly higher savings in areas such as customer service, distribution, and A&G due to the fact that KCPL and Aquila have adjoining service territories, are similarly sized, and have complementary operating strengths. GPE/KCPL Exh. 18, Kemp Supp. Direct, p. 21. Transcript, p. 1065. Kemp's detailed comparisons appear in Exh. 18, pp. 19-21.
[361] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.

additional Aquila operations, but in some instances this was reversed.

e. Screen all the other improvement opportunities suggested by the sub-teams, and decide what was large and tangible enough to include in the synergy estimates.

f. Estimate the reductions to resource levels and associated costs over the 2008 to 2012 period.

g. Estimate any costs to achieve the resource savings.

h. Obtain sign-off from the Great Plains Energy/KCPL executive who will be responsible for meeting the synergies targets.

259. For ratemaking purposes, separate rate bases will be maintained for KCPL, Aquila/MPS, Aquila/SJLP electric, and Aquila/SJLP steam.[362]

260. The integration team method of determining synergy savings is generally the same method used by other utilities. Knowledgeable functional teams drill down into their own areas of expertise, and come up with their best estimates of the savings that are reasonably achievable.[363]

261. **KCPL's merger synergy estimation methodology was comprehensive**. All functions were assigned to one or more teams. The teams addressed as a first order of business any boundaries issues between their areas, to ensure that all cost items belonged to one and only one team.[364]

262. KCPL also performed a top-down check to verify that the sum of the non-fuel O&M costs across their areas was equal to the companies' total non-fuel O&M costs.[365]

263. **KCPL's teams appropriately identified and quantified costs to achieve the estimated gross synergies**.[366]

264. **KCPL's merger synergy estimates are reasonably current and have not changed**. The base cost data were from the most recent available year, i.e., 2006. KCPL's base data were its

[362] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[363] *Id*.
[364] *Id*.
[365] *Id*.
[366] *Id*.

recorded actual costs. Aquila's base cost data were from a management report provided by Aquila in June 2007, which matched the aggregate approved revenue requirement for its Missouri jurisdiction. Its resource data (filled positions, customers, etc.) were from a management report prepared for KCPL in July 2007. These were reliable and current sources for the data.[367]

265. **KCPL's merger synergy estimation methodology is unusually detailed**. The functional teams drilled down to a level of detail that is typically not achieved until the completion of detailed integration planning just prior to transaction close. Estimated synergies in each area were built up from detailed analyses of their constituent sub-areas, i.e., bottom-up estimates were preferred. Top-down estimates based on high-level assumptions or comparative data were used mainly as reality checks, to validate the bottom-up estimates.[368]

266. **KCPL's merger synergy estimates are attributable.** Only created or enabled synergies were counted. In several cases, significant benefits were identified but excluded from the synergies estimates, because they were benefits not directly related to the merger. For example, KCPL witness Buran explains that the estimates of supply chain synergies did not include additional savings related to growth in system sales and spending, because this system growth is driven by the merger.[369]

267. **KCPL's merger synergy estimates are quality assured.** Quality control procedures were implemented on several levels. The functional teams checked their own work and reviewed the work of other teams. Outside consultants facilitated the analytical process and also conducted quality assurance reviews. The transaction team, which included KCPL and Aquila personnel, assessed the quality and reasonableness of the estimates as they rolled up to the enterprise level. Finally, KCPL senior executives reviewed and approved the estimates, and took responsibility for achieving the targeted benefits.[370]

268. **KCPL's merger synergy estimation methodology is conservative.** The functional teams screened out hard-to-quantify

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[367] *Id*.; GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, filed February 25, 2008, pp. 3. Hart-Scott-Rodino restrictions on sharing competitively sensitive information initially restricted KCPL's access to detailed information in the generation area, but the available public data were adequate. *Id*. These restrictions were later lifted allowing full access. See Finding of Fact Number 156.
[368] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[369] *Id*.
[370] *Id*.

benefits, even if potentially significant. They deliberately chose estimates in the low to middle end of the potential savings ranges, when such ranges were available for consideration. **Overly aggressive benefit estimates were screened out.** As noted above, the involvement of sponsoring executives ensured that implementation plans were realistic.[371]

269. The nominal value of KCPL's estimates of the synergies that could be achieved through its merger with Aquila's Missouri electric operations amounts to $305 million over the 2008 to 2012 period.[372]

270. **KCPL's estimated synergy savings are comparable to other utility merger transactions.**[373]

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[371] *Id*. Mr. Kemp also found that the synergy estimates were assured because KCPL senior executives had reviewed and approved the estimates and "took ownership" for achieving the targeted benefits. *Id*. at 12. Taking ownership of the implementation of synergies is a necessary step to achieve the estimated levels of savings. Transcript, p. 1068.

[372] *Id*. See also GPE/KCPL Exh. 30, Zabors Direct, Schedule RTZ-7.

[373] *Id*. Mr. Kemp testified that in order to compare KCPL's synergy estimates to the synergies in other utility mergers, he classified both the base 2006 costs and the estimated synergies into six major functional areas: Generation, Transmission, Distribution, Customer Service, Sales, and Administrative & General (A&G). These groupings correspond to the functional groups of accounts in FERC's Uniform System of Accounts. Since KCPL's synergy estimates are grouped in categories that are not explicitly aligned with FERC's definition of functions, he assigned each line item in KCPL's estimates to the appropriate FERC function, based on KCPL team leaders' descriptions of the type of costs in the line item. The synergy estimates in the supply chain process area were allocated by KCPL to the Supply (Generation), Corporate (A&G), and Delivery teams. The Delivery team includes the Transmission, Distribution, and Customer Service functions. For comparative purposes, Mr. Kemp allocated the supply chain synergies in Delivery to its constituent functions according to each function's share of the base non-fuel O&M expense. He also focused on the savings for the third calendar year of the synergies estimation period (i.e. 2010), again to make the data more comparable to his analyses of other transactions. The year 2010 is fairly representative of the average annual synergies for KCPL over the 2008-2012 period. By that time all of the major synergy related initiatives should be gaining full traction. The 2010 KCPL synergies were deflated to 2006 dollars using the same CPI assumptions as the other KCPL witnesses, to put the synergies on the same real basis as the base year costs. Finally, Mr. Kemp excluded fuel and purchased power costs from his comparisons of realized synergies, as the data from transaction to transaction for this type of cost are so heavily influenced by regional energy market factors and commodity price cycles that they are not meaningful to compare. Since the absolute level of pre-transaction base costs varies widely, according to the size of the companies Mr. Kemp used in the comparison, it would not be meaningful to compare absolute synergies. Rather, quantified synergy levels across different transactions are typically compared on the basis of percentage of base costs. *Id*.

271. The 2010 total non-fuel synergies of $55 million ($51 million in 2006 dollars) amount to 10 percent of the combined 2006 non-fuel O&M costs of KCPL and Aquila.[374]

272. **These estimated synergy levels are reasonable.** A total non-fuel savings level of 10 percent is above average for a utility-utility merger, but is expected for a transaction between neighboring firms that can access the full range of synergies.[375]

273. The level of achievable synergies is affected by many factors. Some of the more important factors are:[376]

> a. Relative size. Similarly sized companies have greater synergy opportunities. Acquisitions of smaller companies by much larger companies do not affect combined costs as much on a percentage basis.
>
> b. Relative operating performance. Greater synergies can be achieved if one company has significantly lower unit costs or superior service quality. Its practices can be transferred to the other company. This is also true on a functional level, e.g., leveraging one company's better distribution O&M practices.
>
> c. Proximity. Neighboring or overlapping service territories make greater synergies possible in both field and corporate operations.
>
> d. Need for capacity. Reductions in capital expenditures for new generation or transmission capacity will be larger if one utility has a long position (i.e., more than adequate capacity) and the other has a more pressing capacity need.
>
> e. Corporate and management culture. Benefits can be larger if one of the companies (especially the dominant partner) has superior project execution capabilities or has demonstrated an ability to achieve superior operating results relative to its peers.

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[374] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[375] *Id*.
[376] *Id*.

274. A review of the data on the proposed merger shows that all of these factors line up to increase the synergies that could be achieved through this transaction.[377]

275. Essentially two types of synergy data are available from other utility transactions that can be compared to KCPL's estimates:[378]

a. Announced synergies data can be obtained from press releases and SEC filings at the time an intended transaction is publicly disclosed. Typically these data are aggregate and not escalated, e.g., "$1 billion in savings over the first 10 years." In describing the strategic rationale for the transaction, the major areas of expected benefit may be mentioned (e.g., back office consolidation, economies of scale in generation operations), but the total synergy number is almost never broken down into its component pieces. Not infrequently, no specific synergy number is disclosed, and the benefits are described only qualitatively.

b. Realized synergies are the actual reductions in real costs (or merger-related increases in revenue) that are achieved by the merged company. Data on realized synergies are most reliably and consistently obtained from utilities' annual filings to FERC on their actual costs of utility operations (FERC Forms 1 and 2). These data must be reviewed carefully, as organizational changes, changes in operating models, one-time events (large storms or extreme weather), changes in accounting methods, changes in industry structure, and subsequent M&A transactions can distort the filed costs.

276. KCPL's estimated synergies, as a percentage of either total O&M or non-fuel O&M, are above the average announced

[377] *Id*.
[378] *Id*.

synergies for utility merger transactions in the U.S. in the past ten years.[379]

277. Compared to 26 other utility merger transactions across all energy utility types, KCPL's percentage savings are well into the upper half of the range.[380]

278. KCPL's estimated synergies are higher than the median level of realized synergies in other comparable transactions.[381]

279. KCPL's estimated synergy savings are greater than the median for Transmission, Distribution, Customer Service, and A&G, less than the median for Generation Non-Fuel O&M and the Sales function (which is a very small part of utility costs), and overall significantly higher than the median for total non-fuel O&M.[382]

280. **The range of 7-10% is a reasonable general expectation for total non-fuel synergy savings.** This is based on synergies estimates and realized synergies across a large number of proposed combinations. Expectations for KCPL and Aquila, at 10% synergy savings, are at the upper end of this typical range.[383]

281. **The KCPL-Aquila pairing has unusually broad opportunities for savings,** as noted above in listing the factors that drive the level of achievable benefits. They are similarly sized. They have complementary operating strengths (e.g., KCPL in generation and transmission and distribution ("T&D"), Aquila in customer service operations) that enable transfer of better practices and creation of substantial savings. They have adjoining service territories, which increases potential operating and corporate synergies. They have differing and complementary capacity positions through the medium

[379] *Id*. Mr. Kemp testified that since the announced synergies from other transactions typically do not distinguish between fuel and non-fuel synergies, he used KCPL's total estimated 2010 synergies - including fuel savings - of $62 million ($55 million in 2006 dollars) for this comparison. *Id*.
[380] *Id*. Only 3 of 26 transactions have higher synergies as a percentage of total O&M, and only 7 of 26 have higher synergies as a percentage of non-fuel O&M. See Schedule WJK-4. The transactions with higher announced synergy percentages generally were expected to benefit from large fuel or purchased energy savings, as generation fleets or gas contract portfolios were integrated. This area of costs is a future upside for KCPL Aquila, as the estimated synergies do not include any benefits from joint generation and transmission dispatch. *Id*.
[381] *Id*. Mr. Kemp testified that he compared inflation-adjusted cost changes for the categories of Generation Non-Fuel O&M, Transmission O&M, Distribution O&M, Customer Service, Sales, and Administrative and General. *Id.*
[382] *Id*.
[383] *Id*.

term. KCPL and Aquila's geographic fit gives the combined companies natural advantages for achieving synergies in T&D operations.[384]

282. **KCPL's synergy estimates both on a stand-alone basis and in the context of industry experience are reasonable and conservative.** At least four separate lines of corroborating evidence support the conclusion that the estimates are reasonable and conservative.[385]

283. KCPL's estimates tend to exceed the industry averages because KCPL and Aquila are neighboring utilities who can access an unusually broad range of synergies.[386]

284. Mergers are complex transactions that entail many risks. There are strategic risks around the choice of business models and transaction partner. There are transaction risks around quality of due diligence, pricing of the transaction, etc. There are execution risks around the successful integration of the two organizations.[387]

285. If the merger does not produce the intended net benefits due to any of these risks, the shareholders will pay a price through lower rates of return or decreased equity value. Shareholders shoulder much of this risk. They bear the costs of the pre-transaction efforts, which could yield no benefits if the transaction does not go forward. They also support up-front financing of transaction costs and costs to achieve.[388]

286. **The utility industry has a generally positive track record on mergers and significant cost savings are normally achieved**.[389]

287. **The level of hard, attributable benefits actually realized through merger transactions is typically in the range of 125 to 175 percent of the announced synergies**.[390]

288. Customers of KCPL and Aquila will benefit, because to the extent that synergies are realized, they will flow through to

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[384] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[385] *Id*. at p. 22. See also Footnote 407.
[386] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[387] *Id*.
[388] *Id*.
[389] *Id*.
[390] *Id*. Mr. Kemp testified that in his considered opinion that the level of synergy benefits that will ultimately be achieved through the merger will be substantially greater than KCPL's current synergy estimates. Joint dispatch of generation and transmission assets could add large benefits, once ISO issues are resolved. Also, due to the ability of competent utility management to find additional cost reductions or revenue enhancements as they dig deeper into the detail of integration planning, synergies tend to expand rather than contract. *Id*.

customers. This is true because KCPL plans to file base rate cases every one or two years for the foreseeable future, so any cost reductions that are achieved would be reflected in the actual costs that are used to establish base rates.[391]

4. Controverting Evidence Regarding the Reasonableness of the Calculated Synergy Savings

289. With regard to synergy savings, the Commission finds the testimony of GPE/KCPL's witnesses, Buran, Cheatum, Crawford, Kemp, Herdegen, Marshall, Steinke, Tickles, Van Dyne, and Zabors to be significantly more credible and substantial than the testimony of Staff's witness Schallenberg, Public Counsel's Witness Dittmer, and the Industrial's witness Brubaker.

a. Staff's Position

290. Contrary to Staff's position in pages 77-80 of its Report, adjusting actual costs by the CPI index, when comparing pre-transaction vs. post-transaction costs for merged utility companies is a basic logical requirement, when analyzing costs across a time series. Otherwise, cost comparisons will be distorted by the effects of inflation.[392]

291. Inclusion of inflation when valuing the synergies was conservative because cost projections were compared against actual 2006 Missouri electric expenses (the baseline). An escalation factor was applied to the budgets and to the baseline to ensure that the effects of inflation were not ignored and that the 2006 baseline was suitable for analysis. The savings versus baseline represent synergies.[393]

292. It is prudent to adjust for the effects of inflation on the operating costs (in nominal dollars) that were reported to FERC by the utilities covered in the synergies analysis. Dollars adjusted for inflation are called "real dollars," and comparisons using real dollars are not distorted by inflationary effects.[394]

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[391] *Id.*

[392] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. Inflation represents increases in the prices of goods and services (and the inputs required to produce them), not increases in the volume of those goods and services. Inflation, or the decrease in the value of the currency (the U.S. dollar in this case) was running in the range of 2 to 4 percent per year in the time period of this realized synergies analysis.

[393] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[394] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. The Commission adopted the use of inflation or escalation indices in prior proceedings. For example, in KCPL's most recent rate case, Case No. ER-2007-0291, Staff used the Handy Whitman Index in calculating the Company's non-labor production and transmission and distribution adjustments. In its Cost-

293. It is reasonable to use the CPI to adjust utility operating costs for the effects of inflation because the CPI is the most widely cited measure of inflation. It is commonly used as a basis for restating nominal dollars into real dollars. The CPI is broadly reflective of utility non-fuel operating and maintenance costs, enjoys wide acceptance, and is easily understood.[395]

294. Use of the CPI is also reasonable because about one-half of the typical utility's non-fuel O&M expenses are labor-related. The price of that labor is closely related to changes in the CPI, as employees seek to keep themselves whole for the effects of inflation on their living expenses. Their expenditures range across the cost categories included in the CPI. In fact, many labor agreements reference the CPI as the basis for changes in labor rates. So as the CPI changes, so do the labor-related costs of utilities.[396]

295. Use of the CPI to calculate real synergy savings is conservative for two reasons. First, the CPI understates the level of inflation in the non-labor portion of utility non-fuel O&M expense. If an index with a greater increase than the CPI had been used to deflate the post-transaction costs of the utilities in KCPL's analysis, the decreases in real costs would have been larger. Second, to the extent that unit sales (kwh) and numbers of customers increased in the four years between the pre-transaction cost data and the post-transaction cost data – as they did

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of-Service Report in that case, Staff stated that these adjustments were consistent with the methodology adopted by the Commission in Case No. ER-2006-0314. *Id.*

[395] *Id*.

[396] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. The Commission's general policy against adjusting historical costs for inflation, when determining historical test year costs, does make sense in the intended context, a rate-making case. The reason that many commissions prefer a historical test year is that cost forecasts are considered too speculative. Use of a historical test year avoids dispute about how to move from recorded actual (i.e., historical) costs to future costs during the effective rate period. However, that situation is a far cry from the widely accepted practice of restating costs from nominal dollars to real dollars, when making comparisons (outside of a ratemaking context) of costs across time, i.e. such as in this merger case. Staff apparently believes that the Commission should consider only "actual" (*i.e.*, nominal) costs [Staff Report, page 77]. The basis for this position is stated on page 79. Staff cites a number of Commission decisions in which it declined to allow historical test year costs to be adjusted for inflation through use of a CPI index. Mr. Kemp's analysis compared inflation-adjusted actual operating costs, as reported to the FERC. He did not compare allowed revenue requirements. A revenue requirements comparison would show how costs were treated for ratemaking purposes, but would be subject to serious shortcomings as a method for analyzing whether the merged companies reduced their costs and became more efficient. *Id*.

in all cases – adjusting the post-transaction costs by only the CPI would not capture the full gains in efficiency realized by the merging utilities.[397]

296. It is also appropriate to exclude Uncollectible Accounts from the comparison of pre-transaction and post-transaction costs for the Customer Service function of the combined utility companies because:[398]

- First, Uncollectible Accounts cost is more properly characterized as a contra-revenue item, not an expense item. The realized synergies analysis deals with non-fuel O&M expenses.
- Second, the levels of Uncollectible Accounts cost are heavily influenced by the rules of the local regulatory jurisdiction, primarily those regarding disconnection procedures (multiple warning notices, time periods to disconnect). These rules can expand or shrink a utility's revenue exposure on overdue accounts, vs. other utilities in other states, for reasons not directly related to a company's effectiveness in managing such accounts. Uncollectible Accounts costs are less controllable by utility management.
- Third, Uncollectible Accounts costs are more closely related to the level of fuel and

[397] *Id*. A more comprehensive (but less conservative) measure of gains in input-output efficiency would involve increasing the pre-transaction costs of the separate companies by both inflation and an index of increased output levels, and comparing those adjusted costs to the post-transaction costs of the combined companies. KCPL not including this output-related adjustment is more conservative. *Id.*

[398] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. Contrary to the Staff's Report, Mr. Kemp's workpapers allowed for a complete review of his analysis [Staff Report, pages 79-80]. The workpapers that Mr. Kemp relied upon directly for his exhibits were filed with his Supplemental Direct Testimony. These workpapers are tables that show pre-transaction and post-transaction costs by functional area for the parent utility companies in the relevant transactions. The charts in Mr. Kemp's exhibits were derived from these tables. In response to Staff's request for further details, Mr. Kemp provided the underlying cost data for the individual utility operating companies that reported cost data to the FERC. Mr. Kemp also explained how the data from the individual utility operating companies were aggregated by the parent utility, and listed the FERC accounts that were included in each functional area of non-fuel O&M expense. Mr. Kemp's data were obtained from the SNL data base service, which groups the accounts as they are grouped in the FERC Uniform System of Accounts. Finally, Mr. Kemp provided three examples of how the reported FERC costs track through from the more detailed level to the aggregate level.

> purchased power costs than the level of non-fuel O&M expenses. When fuel and purchased power costs are high, and push up the total bill to customers, one would expect more customers to have difficulty paying their bill.

297. Staff's contention that the synergies will not be realized in the timelines offered is also in error. In terms of the timing of synergy capture, the close working relationship between Aquila and KCPL resulted in the development of detailed plans to realize the synergies. The teams are actively working to ensure that synergy capture is at full potential as close to the day the merger closes as possible.[399]

298. With regard to Staff's general credibility on its testimony concerning the synergies, Staff did not proffer any other individual subject matter expert that contributed to Staff's Report, attached to witness Schallenberg's five pages of testimony.[400]

299. Staff's major objection to the Application's merger structure is, in reality, a legal issue concerning the requirements of Section 393.190.1 that its testifying witness, Mr. Schallenberg, is not qualified to address, lacking a law degree or any legal education.[401]

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[399] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[400] See Findings of Fact Numbers 70-93 in the Witness Credibility Section. Public Counsel cites to the Missouri Supreme Court Case of *Love 1979 Partners v. Public Service Commission*, 715 S.w.2d 482, for the proposition that the Commission must defer to its Staff and Staff's expertise. See EFIS Docket Number 440; *Initial Brief of the Office of the Public Counsel*, pp. 3-4. Public Counsel misreads the Court's opinion. The Court opined that the court would defer to the Commission's expertise, in part, because the Commission had a staff of experts to advise it. This does not relieve the Commission of its mandate to support its conclusions of law with substantial and credible evidence on the record as a whole. *Environmental Utilities, LLC v. Public Service Com'n*, 219 S.W.3d 256, 263 (Mo. App. 2007); *State ex rel. AG Processing, Inc. v. Public Service Com'n of State*, 120 S.W.3d 732, 734 -735 (Mo. banc 2003); *State ex rel. Rice v. Public Service Com'n*, 359 Mo. 109, 114, 220 S.W.2d 61, 64 (Mo. banc 1949). The Missouri Supreme Court does not require the Commission to defer to incompetent evidence adduced by any party merely because of that party's position or title. The Commission must evaluate the evidence presented in any case, objectively.

[401] Transcript, pp. 1790-91. Mr. Schallenberg conceded that portions of the Staff Report were written by lawyers in the Commission's General Counsel Division, Transcript, pp. 1814-15. That legal argument mirrors the one advocated by the Industrial Intervenors claiming that because the Joint Application does not request approval to merge KCPL and Aquila, Staff may simply ignore the many witnesses who offer detailed testimony on merger synergy savings and the benefits of the detailed plans to functionally integrate and coordinate KCPL and Aquila operations.

300. Staff's final point regarding the Applicants' synergy calculations that the merger is "uneconomical from a consumer perspective even when comparing the cost and benefits sponsored by the Joint Applicants" has little probative value, given Mr. Schallenberg's concession that Staff did not conduct an audit of the asserted merger savings.[402] Neither Mr. Schallenberg nor members of the Engineering and Management Services Department analyzed or developed an alternative calculation of merger synergies.[403] Mr. Schallenberg admitted that in the Staff Report section dealing with merger synergy savings, there was no discussion or evaluation of the testimony offered by KCPL witnesses Lora Cheatum, Wallace Buran, William Herdegen, Dana Crawford, Robert Steinke, Richard Spring or John Marshall.[404] Additionally Mr. Schallenberg admitted that neither his testimony nor the Staff Report has been updated since being filed in October 2007, or after the merger proposal was modified.[405]

b. Public Counsel's Position

301. Contrary to Public Counsel's witness Dittmer's testimony,[406] KCPL's estimates of synergy savings from the proposed merger are not "overstated".[407]

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[402] Staff Exh. 100, Schallenberg Rebuttal at 4; Transcript, pp. 1820-21.

[403] Transcript, pp. 1825-26.

[404] Transcript, pp. 1893-94.

[405] Transcript, p. 1823.

[406] OPC Exh. 200, **Dittmer Rebuttal**, pp. 36-39.

James R. Dittmer is a Senior Regulatory Consultant with the firm of Utilitech, Inc., a consulting firm engaged primarily in utility rate work. The firm's engagements include review of utility rate applications on behalf of various federal, state and municipal governmental agencies as well as industrial groups. In addition to utility intervention work, the firm has been engaged to perform special studies for use in utility contract negotiations. He graduated from the University of Missouri - Columbia, with a Bachelor of Science Degree in Business Administration, with an Accounting Major, in 1975. He holds a Certified Public Accountant Certificate in the State of Missouri. He is a member of the American Institute of Certified Public Accountants. Following his graduation from the University of Missouri, he was employed as an auditor for the Missouri Public Service Commission. In 1978, he was promoted to Accounting Manager of the Kansas City Office of the Commission Staff. In that position, he was responsible for all utility audits performed in the western third of Missouri. During his service with the Commission, he was involved in the audits of numerous electric, gas, water and sewer utility companies. Additionally, he was involved in numerous fuel adjustment clause audits, and played an active part in the formulation and implementation of accounting staff policies with regard to rate case audits and accounting issue presentations in Missouri. From 1979 through 1985 he practiced as an independent regulatory utility consultant. In 1985, Dittmer, Brosch and Associates was organized, which changed its name to Utilitech, Inc., in 1992. For the past twenty-eight years, he has appeared on behalf of clients in utility rate proceedings before various federal

and state regulatory agencies where he performed revenue requirement studies for electric, gas, water and sewer utilities and testified as an expert witness on a variety of rate matters. As a consultant, he has filed testimony on behalf of industrial consumers, consumer groups, the Missouri Office of the Public Counsel, the Missouri Public Service Commission Staff, the Indiana Utility Consumer Counselor, the Mississippi Public Service Commission Staff, the Arizona Corporation Commission Staff, the Arizona Residential Utility Consumer Office, the Nevada Office of the Consumer Advocate, the Washington Attorney General's Office, the Hawaii Consumer Advocate's Staff, the Oklahoma Attorney General's Office, the Oregon Citizens Utilities Board, the West Virginia Public Service Commission Consumer Advocate's Staff, municipalities and the Federal government before regulatory agencies in the states of Alaska, Arizona, Colorado, Florida, Hawaii, Indiana Kansas, Maine, Michigan, Mississippi, Missouri, Nevada, New Mexico, New York, Ohio, Oklahoma, Oregon, Texas, Washington and West Virginia, as well as FERC.

[407] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. As stated in pages 22-23 of Mr. Kemp's Supplemental Direct Testimony:

> 1. Its synergy estimation methodology is sound. The synergy teams have drilled down to an unusually deep level of detail, and have identified and vetted reasonable levels of synergies. The sources of savings that they cited are credible.
> 2. KCPL's estimated total synergies (including fuel) are modestly higher than the median announced synergies for 26 other energy utility transactions (5% vs. 3% of total O&M, 11% vs. 9% of non-fuel O&M). [This is reasonable because the KCPL-Aquila pairing has unusually broad opportunities for savings -- See findings of Fact 248-281.]
> 3. KCPL's estimated synergies for non-fuel O&M expense are significantly higher than the median realized synergies for other electric utility transactions (10% vs. 2%). [However, this is reasonable because the KCPL-Aquila pairing has unusually broad opportunities for savings -- See findings of Fact 248-281.]
> 4. KCPL's estimated synergies are at the upper end of the range that we have advised utility clients, based on our experience, is reasonable to expect in merger transactions 10% v. 7-10%. [Again, this is reasonable because the KCPL-Aquila pairing has unusually broad opportunities for savings – See findings of Fact 248-281.]

As stated in pages 7-9 of Mr. Marshall's Surrebuttal Testimony:

> Aquila is not already enjoying economies of scale and shared corporate overhead related synergies based on its current organization as claimed by Public Counsel. Capturing the identified savings will only be achieved by leveraging the integrated infrastructure and capabilities of KCPL and Aquila. This integration will allow both companies to realize greater economies of scale and shared services. The savings potential for these costs is projected to be $302 million. Costs have only been considered that are included in the Missouri rate case. Any current economies of scale and overhead-related synergies that Aquila enjoys are lessened by a business model with higher costs and non-investment grade debt. Rather than enjoying current savings,

302. Mr. Dittmer's testimony makes virtually no attempt to rebut the analysis contained in Mr. Kemp's Supplemental Direct Testimony, regarding the reasonableness of Great Plains' and KCPL's methods for estimating synergies and the reasonableness of its estimates of total achievable synergies. [408]

303. Synergy estimates were reviewed by Mr. Kemp both on a stand-alone basis and in the context of industry experience. At least four separate lines of corroborating evidence support the conclusion that the estimates are reasonable and conservative:[409]

(1) The soundness of the estimating methodology.

(2) The reasonableness of the synergy estimates vs. announced synergies for comparable transactions.

(3) The reasonableness of the synergy estimates vs. realized synergies from comparable transactions.

(4) The reasonableness of the synergy estimates in the context of Black & Veatch's substantial experience in advising utility management on expectations for merger synergies.

304. The total estimated level of synergy savings are modestly above the industry average. This is expected given the fact that KCPL and Aquila have adjoining territories and can access higher

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Aquila is burdened by an inefficient capital structure and expensive cost base. Savings derived from the merger will offer significant benefits to Aquila and are not achievable without the benefits and improved operations of the merger.

** The commission notes that the $302 million referenced by witness Marshall represents Aquila's corporate overhead costs that were not allocated to Missouri, but are additional costs that will be reduced subsequent to the closure of the merger. This savings is in addition to the projected $305 million in synergy savings. See GPE/KCPL Exh. 31, Zabors Supp. Direct, Schedule RTZ-6 and Transcript pp. 2923-2926. The $302 million was determined using 2006 for the baseline, and as reflected by the testimony, Aquila's corporate costs have already been reduced and the $302 million would be reduced to $221 million if the year 2007 was used as the baseline.

[408] *Id*.

[409] *Id*.

levels of proximity-related synergies (mainly in the generation and T&D areas) than many of the transactions included in the industry data.[410]

305. Another reason that the synergy estimates are conservative, and not "overstated" or "quite aggressive," is the realized synergies are likely to be greater than Great Plains' and KCPL's estimates. Competent utility managers almost always find more synergies as they dig deeper after the transaction, and several significant sources of synergy savings were not included in KCPL's estimates. These observations were not rebutted by any opposing witness.[411]

306. Mr. Dittmer argues that the Commission should consider only those merger-related benefits that go beyond a hypothetical level of stand-alone savings, but he does not explain how those stand-alone savings can be achieved as effectively without a merger. His suggested method of counting benefits is logically equivalent to setting rates for KCPL and Aquila based on an unproven assumption that their costs are equal to those achieved by best-in-class utilities, without allowing KCPL or Aquila to recover any costs that might be incurred in order to achieve such performance.[412]

307. Under questioning from Commissioner Murray, Mr. Dittmer admitted that a utility under financial stress may not have the capital available to fund construction projects and would have to defer them.[413]

308. Mr. Dittmer also admitted during questioning from Commissioner Clayton that he did not know if Aquila had the resources to undertake on its own the $59 million of "enabled" projects that he identified.[414]

[410] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15. Mr. Dittmer is also inconsistent in his logic about economies of scale. He admits [page 36] that Aquila's electric operations enjoy reduced costs due to economies of scale from being part of a larger organization, yet he discounts the possibility that the KCPL/Aquila combination could also produce scale synergies. There is no magic size at which scale economies cease, especially in the corporate overhead areas that he mentions. *Id*. See also GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[411] *Id*.
[412] *Id*.
[413] Transcript, p. 1686.
[414] Transcript, p. 1719.

309. Both created and enabled synergy savings are unlocked by the merger, and both require management initiative and action before they can be realized.[415]

310. It is also not realistic to expect that KCPL and Aquila could separately achieve all the enabled synergies that Mr. Dittmer argues are not merger-related. The merger process is a change enabler.[416]

311. The management and employees of both companies become more open to considering and implementing changes, which they otherwise might not have pursued.[417]

312. The benefits associated with enabled synergies are larger and faster in the merger context than they would be on a stand-alone basis.[418]

313. Contrary to Mr. Dittmer's contention that $59 million in "enabled" synergies should not be allowed,[419] enabled synergies should be included in the total pool of synergy savings, because, in this instance, they are unlocked by the merger.[420]

314. Weighing the expert testimony, the Commission finds that Mr. Dittmer misunderstands the nature of "enabled" synergies as applied to this particular set of facts and circumstances.[421]

315. Similarly, there is no merit to Mr. Dittmer's assertion that synergy savings attributable to the closure of the 20 West Ninth Street headquarters are overstated as a result of the sale of the properties at an amount below net book value because the net book value of the properties is anticipated to be written down to fair value in the application of purchase accounting for the acquisition, which is expected to result in an increase to goodwill.[422]

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[415] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. Schedule JRM-7 provides a direct response to OPC Schedule JRD-1 to show how these synergies are created by the merger. *Id*.
[416] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15.
[417] *Id*.
[418] *Id*.
[419] OPC Exh. 200, Dittmer Rebuttal, pp. 12-16.
[420] Transcript, pp. 1409 GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 1-15; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. Schedule JRM-7 provides a direct response to OPC Schedule JRD-1 to show how these synergies are created by the merger. *Id*. See also Finding of Fact Number 302.
[421] See Findings of Fact Numbers 174-185, 299-306. Transcript, pp. 1408-1416.
[422] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. The Company intends to sell the 20 West Ninth Street building and adjacent properties at the close of the transaction with a target date for sale by the end of 2008. As referenced in the Rebuttal Testimony of

316. Great Plains has not requested recovery of goodwill associated with this acquisition.[423]

317. There is also no merit to Public Counsel's claim that Great Plains or KCPL will pay officers more for running a larger company resulting in reduced synergies. Great Plains does not plan to change its peer group for executive compensation; Great Plains still benchmarks executive compensation by comparison to other companies; the utility executive surveys used to market price utility executive positions classify Great Plains as a medium revenue company, and this classification is not expected to change; current executives are appropriately positioned in market based and company performance data; and Great Plains applies the pay for performance methodology.[424]

318. Finally, the Commission notes that witness Dittmer also presented testimony to the Commission where he stated that "Public Counsel would welcome a scenario under which Missouri ratepayers would no longer be exposed to subsidizing Aquila's failed unregulated business operations."[425] He acknowledged during the hearing that the Applicants' withdrawal of their request to recover Aquila's actual cost of debt changed his analysis of the potential benefits to consumers from a negative to a positive number.[426] He further agreed that with the reduction in Transaction Costs from $95 million to $65 million (Missouri jurisdictional $47.2 million) "the math would work" to increase the positive number.[427] Mr. Dittmer admitted that he did not have the resources to do a "complete bottom-up analysis of the expected synergies," and that as of April 23 when he testified he had not looked at "the underlying work papers for seven months."[428] He conceded that a utility like Aquila that is

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Mr. Dittmer in this case, the company has supplied a Broker Opinion of Value for the properties as prepared by Grubb & Ellis, which indicates a projected market value below the expected net book value of the assets at the time of close. Based on these factors, and the application of purchase accounting under the Financial Accounting Standards Board Statement of Financial Accounting Standards No. 141, Business Combinations, the Company anticipates writing down the value of the 20 West Ninth Street building and adjacent properties to fair value at the time of close. The reduction to the net book value of these properties in the application of purchase accounting is expected to increase the excess of cost over the fair value of acquired net assets in the acquisition (*i.e.*, goodwill). *Id.*

[423] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[424] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19, see in particular pp. 9-10.

[425] GPE/KCPL Exh. 200, Dittmer Rebuttal at 47.

[426] Transcript, p. 1667.

[427] Transcript, p. 1668.

[428] Transcript, pp. 1666, 1720, and 1686.

not able to recover all of its costs has "a bigger hole to crawl out of" and could "go into bankruptcy," with debt holders taking "a bigger pounding than they have already."[429] He additionally noted that the purchase price for Aquila that Great Plains agreed to pay "looks very reasonable," and that adjoining companies like KCPL and Aquila "should achieve more synergies than disjoined utilities."[430] He also admitted that his initial analysis failed to evaluate the merit of either the estimated Transaction or Transition Costs "because we didn't need to,"[431] In response to Commissioner Clayton's questions, Mr. Dittmer acknowledged that, despite his misgivings, "I expect there are some fairly significant synergy savings."[432]

c. The Industrials' Position

319. Similar to Mr. Dittmer's conclusions, the Industrials' witness Mr. Brubaker's label of the synergy savings estimates as being "quite aggressive"[433] is unfounded for the same reasons articulated in Findings of Fact Nos. 294-311, *supra*.

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[429] Transcript, pp. 1682-83.

[430] Transcript, pp. 1694, and 1752.

[431] Transcript, pp. 1724-27. During Mr. Dittmer's testimony on this subject, Public Counsel interjected that because of its "limited budget, we have not had Mr. Dittmer do a whole lot of work since that time," having only paid him to do the "analysis on the original case" and not on the numbers now before the Commission. Transcript, pp. 1724-1725. Public Counsel complains that the Commission should not require a complete analysis of the synergies from the opposition parties because of the limitations in their budget and resources. See EFIS Docket Number 440; *Initial Brief of the Office of the Public Counsel*, pp. 43. Public Counsel's argument seems to be one of asking to be excused from presenting competent and substantial evidence. In essence, Public Counsel requests that the Commission bias itself based upon the relative economics of the parties choosing to participate in this matter. The Commission is unsure how, nor is it appropriate, to apply a sliding scale to evidence adduced in a contested case. The quality of experts produced by the parties may, and usually does, vary, as does the quantum of evidence produced by each party. The Commission cannot shirk its responsibility to render a decision based upon competent and substantial evidence on the record as a whole at the request of a party to a contested case. The Commission must objectively evaluate and weigh all of the evidence presented.

[432] Transcript, p. 1723.

[433] Industrial Intervenors Exh. 300, **Brubaker Rebuttal**, p. 10.

Maurice Brubaker is a consultant in the field of public utility regulation and President of the firm of Brubaker & Associates, Inc. (BAI), energy, economic and regulatory consultants. He graduated from the University of Missouri in 1965 with a Bachelor's Degree in Electrical Engineering. Following graduation, he was employed by the Utilities Section of the Engineering and Technology Division of Esso Research and Engineering Corporation of Morristown, New Jersey, a subsidiary of Standard Oil of New Jersey. In the Fall of 1965, he enrolled in the Graduate School of Business at Washington University in St. Louis, Missouri, where he earned a Master of Business Administration in June of 1967. His major

320. Mr. Brubaker admitted that his "testimony does not address the specifics of the synergies that the Applicants contend will be achieved."[434]

321. Witness Brubaker argued that the synergy estimates should be discarded merely because they are above the median of industry experience. As Mr. Kemp explained in his testimony, the synergies should be expected to be above the industry average since KCPL and Aquila are in close proximity and the potential for synergies is substantially greater than in other transactions.[435]

322. Given that all parties waived cross-examination of Mr. Brubaker, and the testimony given by Great Plains' Mr. Kemp that

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field was finance. From March of 1966 until March of 1970, he was employed by Emerson Electric Company in St. Louis, during which time he earned a Master of Science Degree in Engineering at Washington University. In March of 1970, he joined Drazen Associates, Inc., of St. Louis. Since that time he has prepared numerous studies relating to electric, gas, and water utilities, including cost analysis, rate design, cost forecasts, cogeneration rates and determinations of rate base and operating income. He has also addressed utility resource planning principles and plans, reviewed capacity additions to determine whether they were used and useful, addressed demand-side management issues independently and as part of least cost planning, and reviewed utility determinations of the need for capacity additions and/or purchased power to determine the consistency of such plans with least cost planning principles. He has provided testimony about the prudency of the actions undertaken by utilities to meet the needs of their customers in the wholesale power markets, and has testified before FERC, various courts and legislatures, and the state regulatory commissions of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.

During the past ten years, BAI and its predecessor firm, has participated in over 700 major utility rate and other cases and statewide generic investigations before utility regulatory commissions in 40 states, involving electric, gas, water, and steam rates and other issues. Cases in which the firm has been involved have included more than 80 of the 100 largest electric utilities and over 30 gas distribution companies and pipelines. An increasing portion of the firm's activities is concentrated in the areas of competitive procurement. The firm assists clients in identifying and evaluating purchased power options, conducts request for proposals (RFPs) and negotiates with suppliers for the acquisition and delivery of supplies. The firm has prepared option studies and/or conducted RFPs for competitive acquisition of power supply for industrial and other end-use customers throughout the Unites States and in Canada, involving total needs in excess of 3,000 megawatts. The firm is also an associate member of the Electric Reliability Council of Texas and a licensed electricity aggregator in the State of Texas.

[434] Industrial Intervenors Exh. 300, Brubaker Rebuttal, p. 4.

[435] *Id*.

exposed the weaknesses of the Brubaker analysis,[436] the Commission finds that little weight will be given to his opinions.

323. KCPL and Aquila spent significant time and resources since June 2006 analyzing and developing plans for the merger. Contrary to the assertions of Staff, Public Counsel or the Industrials, the merger process and synergy valuation has been adequate.[437]

324. The forecasted Best Practices Spend Management synergy savings are conservative relative to past experience in both the utility industry and with companies outside the utility industry. They are also in-line with the documented realized savings from contiguous mergers within the utilities industries.[438]

325. The actions required to achieve the synergies align well with the collective expertise of the combined companies and can be implemented with a high degree of confidence.[439]

326. The forecasted savings are both realistic and achievable.[440]

327. KCPL has adequately supported its contention that the synergies it has identified are a direct result of the merger.[441]

328. Since the Applicants have agreed to recover any merger savings through "regulatory lag" as part of the traditional ratemaking process,[442] there is no net detriment to customers. Under this proposal, if the Applicants are not able to demonstrate the realization of synergies, then none could be used to recover Transaction or Transition costs.[443]

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[436] GPE/KCPL Exh. 19, Kemp Surrebuttal, pp. 10-12 (above-industry synergies should be expected since KCPL and Aquila have adjoining service territories).
[437] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[438] GPE/KCPL Exh. 6, Buran Supp. Direct, pp. 2-27, and accompanying schedules.
[439] *Id*.
[440] *Id*.
[441] *Id*.; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. Schedule JRM-7 provides a direct response to OPC Schedule JRD-1 to show how these synergies are created by the merger. *Id*. An example of the supported synergies is KCPL's ability to successfully implement automatic meter reading ("AMR") across the Aquila customer base that will only be achieved with the skills, knowledge, financial, and employee resources that KCPL possesses. Specifically, KCPL has detailed systems and information technology ("IT") knowledge that has resulted in the development of code, capabilities, and enhanced processes for KCPL's CIS Plus system that will be used to expedite the implementation of AMR and accelerate the realization of value from it. *Id*.
[442] Transcript, pp. 1301, 1309-11.
[443] Transcript, p. 1311.

329. The Commission finds that the synergies and savings that will result from the merger are real and substantial, and will produce benefits that support the approval of the Applicants' requests.

F. Findings of Fact Regarding Transaction and Transition Cost Recovery

330. Great Plains will use the purchase accounting method to record the merger, if approved by the Commission. Under the purchase method, Great Plains will record the net assets acquired at fair market value. In the case of regulated assets and liabilities, fair value is generally considered to be book value.[444]

331. The excess of the purchase price, including transaction costs, over the fair market value of the net identifiable assets is recorded as goodwill.[445]

332. The Applicants do not request authorization to recover the acquisition premium component of goodwill associated with the merger.[446] The Applicants request recovery of the transaction cost component of goodwill over a five-year period.[447]

333. After revising their merger application, the Applicants continued to request that they be permitted to recover, in general rate cases, the majority of the transaction costs.[448]

334. Applicants request that the Commission allow the surviving entities to defer both transaction and transition costs and to amortize them over a five-year period beginning with the first rate cases

[444] GPE/KCPL Exh. 29, Wright Direct, pp. 2-3. Under Generally Accepted Accounting Principles ("GAAP"), the accounting rules for a business combination are prescribed in Financial Accounting Standards Board ("FASB") Statement No. 141, *Business Combinations.* FASB Statement No. 142, *Goodwill and Other Intangible Assets,* is also relevant to the merger, among others. *Id.* at p. 2. See also Transcript, pp. 1990-1995.

[445] *Id*. at p. 3. "Goodwill" is defined as the excess of the purchase price over the net book value. Transcript, p. 2013. An "acquisition adjustment" is the summation of the transaction costs and the acquisition premium and is consistent or synonymous with the term "goodwill." Transcript, pp. 2013-2014. The term "merger premium" is consistent with "acquisition premium." Transcript, p. 2014.

[446] *Id*. Financial Accounting Standards Board ("FASB") Statement No. 142 does not allow amortization of goodwill. Rather, the statement requires annual impairment testing to determine whether the value of the underlying asset has been impaired. If an impairment is indicated, a write-down would be required. Impairment testing, between annual testing, is required if events or circumstances indicate an impairment is more likely than not. *Id.*

[447] GPE/KCPL Exh. 29, Wright Direct, p. 3.

[448] GPE/KCPL Exh. 37, Bassham Additional Supp. Direct, p. 4.

post-transaction for Aquila and KCPL subject to "true up" of actual transition and transaction costs in those future cases.[449]

335. Recovery of transaction and transition costs would not be sought if insufficient synergy savings were realized to cover those costs.[450]

336. There is no credible evidence in the record that transaction and transition costs, as calculated by Great Plains and KCPL, are inaccurate or unreasonable.[451]

1. The Applicants' Proposal for Transaction and Transition Cost Recovery

337. The Applicants believe the concept of assigning costs in proportion to savings is appropriate and have identified synergy savings and developed an allocation for those savings based on specific cost drivers.[452]

338. A cost driver is an activity that causes a cost to be incurred. For example, meter reading costs are driven by the number of meters in the field. Billing costs are driven by the number of bills processed.[453]

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[449] *Id*. GPE/KCPL is requesting authority from the Commission to establish a regulatory asset account on the books of KCPL and Aquila for both the transition-related and transaction costs and to allow those costs to be amortized over a five-year period beginning at the time of the completion of the merger. GPE/KCPL Exh. 23, Rush Supp. Direct, pp. 2-14.

[450] Transcript, p. 1310-1311, 1707-1708, 1773.

[451] Transcript, pp. 1405-1406, 1723-1726, 1996, line 11 through p. 1999, line 4, p. 2007, 2929-2934. See GPE/KCPL Exhibits 1, 2, 3, 6, 23, 30, 31, and 37.

[452] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 4-6.

[453] GPE/KCPL Exh. 23, Rush Supp. Direct, pp. 2-14.

Tim M. Rush is employed by KCPL as Director of Regulatory Affairs, a position he has held since 2001. His general responsibilities include overseeing the preparation of KCPL's rate cases, class cost of service and rate design. He is also responsible for overseeing the regulatory reporting and general activities specific to the state of Missouri and the Missouri Public Service Commission. He received a Master's Degree in Business Administration from Northwest Missouri State University in Maryville, Missouri and completed his undergraduate study at both the University of Kansas in Lawrence and the University of Missouri in Columbia. He received a Bachelor of Science Degree in Business Administration with a concentration in Accounting from the University of Missouri in Columbia. Prior to his employment with KCPL, he was employed by St. Joseph Light & Power Company ("Light & Power") for over 24 years. At Light & Power, he was Manager of Customer Operations from 1996 to 2001, where he had responsibility for the regulatory area, as well as customer services, which included the call center, collections and marketing areas. Prior to that, he held various positions in the Rates and Market Research Department from 1977 until 1996. He was the manager of that department for fifteen years. He has testified in numerous proceedings before the Commission.

339. Other cost drivers may result in the costs being directly assigned to a specific jurisdiction or combination of jurisdictions. [454]

340. The terms "cost driver" and "allocation factor" can be used interchangeably.[455]

341. In order to develop an appropriate method to allocate the synergies, transition-related, and transaction costs to the various KCPL and Aquila regulatory jurisdictions and to Aquila's non-regulated operations (referred to as "Merchant"), an allocation team with representatives from Great Plains, KCPL, and Aquila determined an allocation factor for each synergy savings based on the most representative cost driver. The allocation team's approach was to keep the allocation factors relatively simple and easily auditable.[456]

342. The KCPL regulatory jurisdictions include KCPL-Missouri, KCPL-Kansas and KCPL-wholesale. [457]

343. The Aquila regulatory jurisdictions include Aquila MPS-retail, Aquila MPS-wholesale, Aquila L&P-electric, and Aquila L&P-industrial steam.[458]

344. A "general allocator" was selected for Shared Services non-fuel O&M expense synergies. This was because Shared Services activities encompass general corporate overhead, including Accounting, Legal, Executive, etc., and because no single cost driver is appropriate for these activities, a multi-part "general" allocation factor was used. Great Plains and Aquila use a similar general allocator for their overhead allocations, as documented in their respective Cost Allocation Manuals. The allocation team decided on a three-part general allocation factor including: net plant; retail revenue; and payroll costs.[459]

345. A general allocator was not used for any of the other synergy categories, except for the synergy attributable to the sale of Aquila's current corporate headquarters at 20 West 9th Street, because the other categories have identifiable cost drivers.[460]

346. Once the appropriate cost drivers/allocation factors were identified, a two-step approach was used to allocate the synergies

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[454] GPE/KCPL Exh. 23, Rush Supp. Direct, pp. 2-14.
[455] *Id*.
[456] *Id*. See Schedule TMR-2 for a depiction of the cost drivers utilized by GPE/KCPL.
[457] *Id*.
[458] *Id*.
[459] *Id*.
[460] *Id*. For example, delivery and customer service costs are directly influenced by the number of customers or meters. Supply costs, on the other hand, are directly influenced by output levels, such as megawatt hours generated and/or purchased. *Id*.

among the various regulatory jurisdictions and the Merchant operation:[461]

> (1) Each synergy item was allocated among KCPL, Aquila-MPS, Aquila-L&P and Aquila-Merchant, based on the applicable allocation factor and the associated statistical data. In many cases, only certain of these entities were affected, as shown on Schedule TMR-2 (the "Allocated to" column).
> (2) Further allocation of the synergies identified in step one to KCPL's three regulatory jurisdictions, Aquila-MPS's two regulatory jurisdictions, and Aquila-L&P's two regulatory jurisdictions, as applicable.[462]

347. The KCPL synergies identified in step one were allocated to its jurisdictions based on allocation percentages established in KCPL's recent rate case, for cost drivers that were the same as or similar to the cost drivers used in step one.[463]

348. Because of the changes in the level of sales between jurisdictions, Applicants propose to allocate the cost of electric operations based on the change in sales between jurisdictions in comparison to the base period sales.[464]

349. Applicants propose to allocate the merger integration costs (transition and transaction costs) over a period of five years (beginning with the effective date of rates ordered by the Commission in the first rate case after the close of the merger) to each of the retail,

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[461] *Id*. See Schedule TMR-1, as modified by the change in merger proposal – EFIS Docket Number 385, *Identification of Evidence That Is No Longer Relevant to the Joint Application*, filed May 9, 2008.

[462] *Id*. The result of this two-step allocation process is presented on Great Plains and KCPL's witness Tim Rush's Schedule TMR-1 below, which depicts the proposed overall allocation of synergies to each jurisdiction, including Aquila Merchant and both KCPL and Aquila MPS wholesale. The allocation, as proposed and described by the Applicants, demonstrates that each jurisdiction will receive a benefit from the merged organization because the synergy benefits filter to those jurisdictions as a result of the allocation process. *Id*.

[463] *Id*. For example, KCPL's Shared Services synergies were allocated to KCPL's three regulatory jurisdictions based on a general allocator identical to the three factors utilized to allocate total Shared Services synergies in step one.

[464] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 4-6.

wholesale and merchant operations of KCPL and Aquila based on the contribution of synergy savings estimated from the base period.[465]

350. The percentage allocation for electric operations, under the Applicants' proposal, would be adjusted in each rate case to reflect the change in sales in each jurisdiction between the base period and the rate case.[466]

351. With regard to how Aquila-MPS's synergies were allocated between its retail and wholesale jurisdictions, the Aquila-MPS synergies identified in step one were allocated based on a 99.46% retail to 0.54% wholesale allocation, consistent with Aquila's recent rate case.[467]

352. With regard to how Aquila-L&P's synergies were allocated between its electric and industrial steam regulatory jurisdictions, Aquila-L&P's synergy savings identified in step one were allocated based on various allocators established in the 2007 Aquila rate case, including the Administrative & General allocator, the O&M allocator, and the coal burn allocator.[468]

353. Under the allocation proposal, both transition and transaction-related costs to achieve were allocated in direct proportion to the synergies allocation discussed in Findings of Fact Nos. 330-345, *supra*.[469]

354. Great Plains and KCPL maintain that each jurisdiction of KCPL and Aquila will enjoy a reduced cost from the merger as a result of the overall allocations of synergies, transition-related costs, and transaction costs.[470]

355. Assuming the merger is consummated in 2008, it is expected that the first change in rates that include merger synergy savings will occur in mid-2009.[471]

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[465] *Id*.; GPE/KCPL Exh. 23, Rush Supp. Direct, p.6 and Sch. TMR-1.
[466] *Id*.; See also Schedule CBG-1. The Industrial Steam, Merchant and FERC operations allocation percentage will remain unchanged from the base period. If the electric sales mix does not change between the base period and the next rate case, then the allocation percentages in the following table would be the allocation of costs to each jurisdiction. For the Missouri operations, this represents a 72.75% allocation of Merger Integration Costs. Likewise, Missouri operations will receive 72.75% of the synergy savings. *Id.*
[467] GPE/KCPL Exh. 23, Rush Supp. Direct, pp. 2-14.
[468] *Id*.
[469] *Id*.
[470] *Id*.; GPE/KCPL Exh. 39, Giles Additional Supp. Direct, Schedule CBG–1, p. 4-6.
[471] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, filed February 25, 2008, p. 4-6.

356. The Applicants plan to file an additional rate case implemented to correspond with the completion of Iatan 2, sometime in mid-2010.[472]

357. Based on the assumptions in findings of Fact Numbers 348 and 349, it is expected that Missouri customers will receive net benefits between now and 2013 of over $100 million.[473]

2. The Reasonableness of Allowing Recovery of Transaction and Transition Costs

358. Transaction costs are generally not recovered through rates but rather charged to shareholders because transaction costs consist of costs incurred by both the acquiring company as well as the acquired company to complete the transaction, and not to facilitate the provision of utility service – such costs are properly considered to be a part of the purchase price of the acquisition.[474]

359. Absent the specific rate and accounting treatment being requested by the Applicants, pursuant to Generally Accepted Accounting Principles, transaction costs would be added to the value of the consideration being given by Great Plains for the Aquila stock being acquired to arrive at the total purchase price of the transaction.[475]

360. Transaction costs do not meet the normal criteria for traditional expenses used to establish rates. These costs are not used or useful nor necessary for the provision of safe and adequate service. These costs are investor costs incurred in the buying and selling of their stock. These are the costs of a non-regulated holding company. Great Plains and its Board decided to incur these costs. Recovery of these transaction costs would result in regulated utilities subsidizing their non-regulated parent companies.[476]

361. Great Plains and KCPL maintain that while denial of their request for recovery of transaction costs may not prevent the merger from being consummated, it would deprive the Applicants of financial flexibility as they manage a variety of post-merger issues.[477]

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[472] *Id*.
[473] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, filed February 25, 2008, p. 4-6. Transcript, pp. 1424-1425.
[474] OPC Exh. 200, Dittmer Rebuttal, p.42-45. The Commission finds Mr. Dittmer's testimony with regard to the general nature of transaction costs to be credible.
[475] *Id*.
[476] Transcript, pp. 1484-1491, and 1726; Staff Exh. 100, Report p. 51; Transcript, p. 2050.
[477] Transcript, pp. 1384-85, 1982-83, and 2319-2320.

362. The denial of the recovery of transaction costs would not affect the companies' credit ratings.[478]

363. The transition costs quantified by the Applicants will be incurred to integrate Aquila and KCPL operations. Without incurring these costs, the companies could not achieve the estimated synergies, while maintaining or improving system reliability for Aquila's and KCPL's customers.[479]

364. It is Staff's view that transition costs can be booked on the utility's books when incurred and then brought up in rate cases for their reasonableness and prudence to determine if they should be recoverable.[480]

365. There is no credible or substantial evidence in the record that weighs against allowing the Applicants to recover transition costs if the Commission approves the Applicant's merger proposal.[481]

G. Findings of Fact Regarding Credit Quality Following the Merger

1. Credit-Worthiness

366. An investment-grade credit rating is important to utility customers because many times a company is required to go to the capital markets in support of a capital spending program. In doing so, credit quality plays an important role in both the cost and availability of that capital.[482]

367. Although a company's credit rating applies most directly to its access and cost of debt, companies with a lower credit quality also find fewer equity investors willing to risk their investment dollars on their stock. In both instances, debt and equity investors demand a higher cost or return on their investment dollars to compensate them for the higher credit risk. This increased cost of capital can translate directly into higher costs for customers.[483]

368. Great Plains has a Standard and Poor's ("S&P") credit rating of BBB- and KCPL has an S&P credit rating of BBB, both of which are investment grade.[484]

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[478] Transcript, pp. 1322-1323.
[479] GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 3. Transcript, p. 1381
[480] Transcript, p. 2040.
[481] It is Staff view that it is appropriate for transition costs to be booked on the utility's books when incurred and brought up in subsequent rate cases for a review of reasonableness and prudence. Transcript, p. 2040.
[482] GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 4, 6-7.
[483] *Id*. at p. 4.
[484] GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

369. Great Plains extensively discussed the credit rating effects of the proposed merger with the credit rating agencies prior to announcing the merger.[485]

370. In October 2006, Great Plains engaged S&P to conduct an analysis of the merger through S&P's Ratings Evaluation Service, based on transaction assumptions as they stood at that time.[486]

371. In January 2007, Great Plains engaged S&P to perform another assessment based on the then-current transaction assumptions, and also engaged Moody's Investor's Service ("Moody's") to conduct a similar analysis through its Ratings Assessment Service.[487]

372. S&P indicated that, upon announcement of the merger, the long-term ratings of Great Plains and KCPL would not change but that the ratings would be placed on "Credit Watch – Negative." This action would communicate S&P's intent to formally review Great Plains' and KCPL's credit ratings during the period between the announcement of the merger and the closing and, in particular, to evaluate whether a number of important "regulatory considerations" surrounding the merger were addressed in a manner consistent with initial assumptions. Satisfactory resolution of these matters would lead to S&P's action to, as

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[485] GPE/KCPL Exh. 8, **Cline Direct**, pp. 1-10.

Michael W. Cline is employed by Great Plains, the parent company of KCPL, as Treasurer and Chief Risk Officer. His responsibilities include financing and investing activities, cash management, bank relations, rating agency relations, enterprise risk management, and insurance. He graduated from Bradley University in 1983 with a B.S. in Finance, summa cum laude. He earned an MBA from Illinois State University in 1988. From 1984-1991, he was employed by Caterpillar Inc. in Peoria, Illinois and held a number of finance and treasury positions. From 1992-1993, he was Manager, International Treasury at Sara Lee Corporation in Chicago, Illinois. From 1994-2000, he was employed by Sprint Corporation in Overland Park, Kansas, initially as Manager, Financial Risk Management and then as Director, Capital Markets. During most of 2001, he was Assistant Treasurer, Corporate Finance, at Corning Incorporated in Corning, New York. He joined Great Plains in October 2001 as Director of Corporate Finance. He was promoted to Assistant Treasurer in November 2002. During 2004, he was assigned to lead the company's Sarbanes-Oxley Act compliance effort on a full-time basis, though he retained the Assistant Treasurer title during that time. He was promoted to Treasurer in April 2005 and added the title of Chief Risk Officer in July 2005. He has previously testified before the Commission and the Kansas Corporation Commission.

[486] GPE/KCPL Exh. 8, Cline Direct, pp. 1-10. A copy of S&P's October 2006 analysis is included with Exh. 8 as Exhibit MWC-3(HC).

[487] *Id*. Copies of S&P's and Moody's January 2007 analyses are attached to Exh. 8 as Exhibits MWC-4(HC) and MWC-5(HC), respectively.

outlined in their January 9, 2007 analysis, "remove GXP and KCPL's ratings from CreditWatch, **reaffirm all ratings** . . . ."[488]

373. S&P also indicated that KCPL's short-term rating would be lowered from A-2 to A-3 upon the transaction announcement. This is S&P's standard methodology in instances where the ratings for companies with BBB senior unsecured ratings are placed on Credit Watch – Negative during the pendency of a merger.[489]

374. Given the assumptions provided to Moody's and S&P by Great Plains and KCPL, both agencies indicated that Great Plains' and KCPL's credit positions should be maintained following the merger.[490]

375. KCPL benefits from its strong credit quality in a number of ways that generally reduce its cost of capital.[491]

376. At the time the merger was announced, Aquila had an S&P credit rating of B, which is below investment grade.[492]

377. Consistent with S&P's methodology with respect to KCPL, Aquila's ratings will be based on those of Great Plains.[493]

378. Since Aquila will be a wholly-owned subsidiary of Great Plains, debt at the Aquila level will be structurally senior to debt at the parent company.[494]

379. S&P typically assigns a rating for the subsidiary that is one notch higher than the parent rating. As a result, if Great Plains' ratings were maintained at the current senior unsecured rating of BBB-, KCPL would expect Aquila's senior unsecured rating to be BBB. If Great Plains were downgraded, Aquila's rating would likely be established one notch above the lower parent rating.[495]

380. Upon the public announcement of the companies' intent to merge, S&P placed Aquila on positive watch.[496]

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488 GPE/KCPL Exh. 8, Cline Direct, p. 6 (emphasis added); GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13. See also Staff Exhs. 124 and 125; and Letter dated January 12, 2007 from Moody's Investor Service to Michael Cline (Highly Confidential) that's included in Schedule MWC-5 of Exh. 8, Cline Direct.

489 Transcript, pp. 2322, 2364, 2370 GPE/KCPL Exh. 8, Cline Direct, pp. 1-10; GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

490 GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13. See also Staff Exhs. 124 and 125;

491 GPE/KCPL Exh. 8, Cline Direct, pp. 1-10.

492 GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

493 GPE/KCPL Exh. 8, Cline Direct, pp. 1-10.

494 *Id*.

495 *Id*.

496 GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

381. Moody's indicated that, upon announcement of the merger, the long-term ratings of Great Plains and KCPL, as well as the Stable Outlook assigned to each, would not change.[497]

382. Unlike S&P, Moody's did not place the ratings under formal review, but states the following in its January 12, 2007 analysis:[498]

> Please note that the ratings determined herein are point in time assessments and based upon a set of assumptions presented by the company with regard to the structure of the proposed transaction. Additional facts and industry-specific circumstances including potentially different regulatory outcomes could change the overall assessment of the ratings.[499]

383. Moody's indicated that Aquila's debt assumed or guaranteed by Great Plains would be rated equivalent to Great Plains' ratings, *i.e.*, currently Baa2 senior unsecured.[500]

384. The actions taken by S&P and Moody's upon announcement of the merger were fully consistent with what they had conveyed in their respective assessments.[501]

385. Aquila has approximately $1 billion of net operating losses on its balance sheet.[502]

386. For a regulated utility such as Aquila, net operating losses are generated in large part through unregulated activities and regulated activities that are not allowed to be recovered in rates. Great Plains expects to utilize these losses in the transaction to offset future earnings. The benefit of that utilization is part of Great Plains' valuation and pricing of Aquila. Without retaining those benefits generated outside

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[497] GPE/KCPL Exh. 8, Cline Direct, pp. 1-10. When the status of Aquila becoming a subsidiary of Great Plains, as opposed to being merged with KCPL was confirmed with Moody's, Moody's verbally clarified that KCPL's ratings would remain unchanged. See in particular Schedule MWC-5(HC).

[498] *Id*.

[499] *Id*. Moody's Investment Service Letter to Michael Cline, dated January 12, 2007, 5. See also MCW-5 (HC). Point in time assessment based upon certain set of assumptions.

[500] *Id*. The discussion in the January 12, 2007 analysis was framed around KCPL as guarantor; however, Moody's subsequently confirmed the same methodology would apply with Great Plains as guarantor.

[501] *Id*.

[502] GPE/KCPL Exh. 2, Bassham Supp. Direct, p. 6. GPE/KCPL Exh. 9, Cline Supp. Direct, pp. 1-15. See also Schedule MWC-6 (HC) listing the debt.

the regulatory environment, the price offered to Aquila shareholders would have been reduced.[503]

387. As of year-end 2006, the potential tax benefit associated with those net operating losses is $426 million, net of proposed IRS adjustments and tax reserves.[504]

388. The nature of the transaction, specifically the sale of significant utility assets to Black Hills, uniquely enables the use of much of Aquila's net operating losses. It would take several years for Aquila as a stand-alone company to utilize these tax attributes, and to the extent not fully utilized, they would have been lost.[505]

389. Great Plains' ability to pay the price necessary to purchase Aquila and deliver synergies is significantly supported by its ability to fully utilize the tax losses of Aquila.[506]

390. Maintaining high credit quality is vital to debt and equity investors, banks, and rating agencies for three primary reasons:[507]

> (1) Investors need to have confidence in a company's credit strength and financial strength to feel comfortable making capital available on attractive terms, particularly given the number of investment alternatives otherwise available to them.
>
> (2) Achieving an investment-grade credit rating will significantly lower Aquila's cost of debt.
>
> (3) Equity investor views of Aquila's financial strength and credit quality will be a major influence on Great Plains' stock price. A number of other factors will also impact the performance of Great Plains' stock. However, because Aquila's earnings will represent a significant portion of Great Plains' core earnings and assets, assurance of Aquila's continued strength

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[503] GPE/KCPL Exh. 2, Bassham Supp. Direct, pp. 6-7. As an example, as Aquila's actual debt cost increased over the past several years, but its ability to recover those costs did not, the additional costs were borne by shareholders and, therefore, created an under-earning situation. In Aquila's case, that under-earning grew to a point that when combined with its unregulated losses, the company generated actual operating and capital losses. *Id.*
[504] *Id*. at p. 6.
[505] *Id*. at pp. 6-7.
[506] *Id*.
[507] GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

is, and will remain, extremely important to Great Plains investors.

391. Aquila would benefit from the achievement of an investment-grade rating primarily through significant savings on new debt issued to fund future capital expenditures.[508]

392. In addition to significantly reduced interest costs, the strong financial profile that goes hand-in-hand with an investment-grade rating will provide similar benefits to Aquila in terms of Aquila's ability to do the following: (1) readily attract the capital needed to make infrastructure investments; (2) meet its obligations in a timely fashion; (3) attract and retain a high-quality workforce; and (4) invest in the communities it serves.[509]

393. In June 2007, Aquila utilized cash on hand and a portion of the proceeds from the sale of its Kansas Electric properties to retire a number of their debt issues. In all, Aquila called four issues totaling $344.0 million, with a weighted average coupon rate of 7.90%, and planned to call approximately $2 million additional in August of 2007. The two largest issues retired as part of this activity, $287.5 million of 7.875% Retail Quarterly Interest Bonds due in March 2032 and $51.5 million of 8.00% Senior Notes due in March 2023, had been assumed to still be outstanding at closing when interest synergies were originally calculated.[510]

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[508] GPE/KCPL Exh. 8, Cline Direct, pp. 1-10; GPE/KCPL Exh. 1, Bassham Direct, pp. 12-13.

[509] GPE/KCPL Exh. 8, Cline Direct, pp. 1-10.

[510] GPE/KCPL Exh. 9, Cline Supp. Direct, pp. 1-15. The four issues retired are the last four listed in the table entitled "Bonds Previously Tendered, Matured, or Converting" in Schedule MWC-6 (HC). The approach a firm takes in managing a portfolio of liabilities depends on its objectives. A firm may decide to retire different debt issues if its goal is to reduce interest expense on the income statement going forward than it might if the focus were on minimizing the near-term volatility in reported results. A firm could also choose to make maximum dollar reduction of debt the top priority for credit reasons, or focus only on those issues that could be refinanced at lower rates based on current borrowing cost or the opportunity cost of available cash. Aquila's liability management objectives in 2007 were originally projected to focus more upon retiring their higher-cost debt issues in order to reduce interest expense going forward. However, Aquila adopted an approach that used its available cash to target issues that were callable either at par (face value) or at a small premium. This enabled Aquila to maximize the amount of debt reduction on their balance sheet, achieve some degree of interest expense savings going forward, minimize the income statement hit that would result from retiring higher-premium issues, and obtain positive refinancing economics since the all-in cost, including call premiums, of the retired debt was higher than the rate Aquila could earn by investing the cash at money market rates. *Id*.

394. The rating agencies have reinforced Aquila's approach to retiring debt through their rating changes on Aquila since the company's announcement of this strategy.[511] S&P upgraded Aquila's senior unsecured rating one notch, from B to B+, on May 15, 2007, while Moody's upgraded the senior unsecured rating two notches from B2 to Ba3 on June 22, 2007. Despite these upgrades, Aquila's senior unsecured rating remains four notches below the lowest investment-grade level of BBB- at S&P and three notches below the Baa3 investment-grade threshold at Moody's.[512]

395. Aquila plans to retire some of its debt prior to the closing deadline for the merger; however, the exact amount is classified as being highly confidential and is listed on Schedule MWC-6(HC).[513]

396. Portions of Aquila's debt will mature or covert prior to the closing deadline of the merger.[514]

397. The debt issues anticipated to remain on Aquila's balance sheet at the time of the deadline for closing the merger will still be retireable and Aquila has a number of issues representing over 90% of its outstanding debt that could be fully retired at a "make-whole" price.[515]

398. The balance of Aquila's debt without a "make-whole" provision can be repurchased in the market through a tender offer.[516]

399. Great Plains expects that Moody's and S&P's would upgrade Aquila's credit rating to Baa2 and BBB, respectively, within a relatively short period following closing of the merger.[517] If realized, this upgrade would result in an immediate coupon rate reduction in two of Aquila's senior note issues.[518] Two of Aquila's high coupon debt issues

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[511] GPE/KCPL Exh. 9, Cline Supp. Direct, pp. 1-15.
[512] *Id*.
[513] *Id*.
[514] *Id*. See the table entitled "Bonds Previously Tendered, Matured, or Converting" in Schedule MWC-6 (HC). For example, the remaining $2.6 million of Aquila's Premium Income Equity Security (PIES) will convert to common stock in September 2007. *Id*.
[515] *Id*. The method for determining the make whole price, when applicable, is outlined in the prospectus for each security. *Id*.
[516] *Id*. While there is no certainty as to the amount of any particular issue that existing holders would make available in response to a tender offer, it should be possible to structure the terms of the offer in a manner that would be sufficiently attractive to ensure a significant degree of investor participation. *Id*.
[517] *Id*.
[518] *Id*. The prospectus supplements for these securities, which include a description of the coupon reductions, are attached as Schedule MWC-7 and MWC-8. Some of this information is classified as being highly confidential and will not be reprinted in this Order.

have step-down provisions that lower the coupon on the debt upon achievement of an investment-grade credit rating (*i.e.*, Aquila has a coupon debt issuance currently at 14.875% that will step down to 11.875% and another coupon debt issuance currently at 9.95% that will step down to 7.95% upon its achievement of an investment-grade credit rating).[519]

400. Ratepayers would benefit from an upgrade in Aquila's investment-grade credit metrics because the expected credit ratings for Aquila post-merger (senior unsecured ratings of BBB at S&P and Baa2 at Moody's) are one notch better than the lowest investment grade ratings used to establish the actual interest cost allowed in current rates.[520]

401. Great Plains has not yet prepared financial models that, in detail, determine the borrowing needs of the Missouri assets to be acquired by Great Plains for 2008 and beyond. However, Great Plains' financial advisor on the transaction has prepared an indicative model that reflects cash requirements for 2008 and 2009.[521]

402. Great Plains has also not yet made any definitive determinations as to how the funding needs of the Aquila properties will be met; however, it is reasonable to assume that Aquila being able to borrow at a senior unsecured debt rating of BBB/Baa2 would result in interest savings compared to equivalent borrowings at BBB-/Baa3, whether the borrowings were short or long-term in nature.[522]

403. Also, short-term borrowing facilities are frequently structured such that, within the investment grade spectrum, an upgrade of one notch reduces the borrowing cost. Great Plains' revolving credit facility, as an example, contains a "pricing grid" that reflects a difference between a senior unsecured credit rating of BBB/Baa2 and BBB-/Baa3 of 10 basis points. This reflects a difference in the interest cost only and does not take into account any other fee reductions, *e.g.*, commitment or facility fees that would result from the upgrade.[523]

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[519] GPE/KCPL Exh. 8, Cline Supp. Direct, pp. 1-15.

[520] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.

[521] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21. See Schedule MWC-15. Again, some of this information is classified as being highly confidential and will not be reprinted in this Order.

[522] *Id*. As an example, Schedule MWC-16 reflects the historical borrowing spreads, assuming issuance of 10-year debt, for utilities with a rating of "BBB" compared to those rated "BBB-" over the past nine years. As the Schedule indicates, the average benefit to the higher rating over the period has been 25 basis points.

[523] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.

404. Of Aquila's total portfolio, nine issues totaling about $53 million were fully allocated to Aquila's Missouri operations at their actual coupon rates in Aquila's most recent rate case.[524]

405. Of the remaining Aquila debt, a total of about 60% was allocated to Aquila's Missouri operations in varying proportions for each of the six individual issues.[525]

406. The Applicants propose to use the established process for apportionments of the remaining debt in future rate cases as Aquila's Missouri rate base increases.[526]

407. Once those issues mature and are refinanced by Aquila, which the Applicants expect to be an investment-grade company following the merger, Aquila will file for recovery of actual interest costs of the replacement debt, and other debt it issues, in rates going forward.[527]

408. Aquila will be able to finance its operations at a lower cost going forward as a result of Great Plains' acquisition, and it is a reasonable assumption that Missouri ratepayers will benefit in the long run from reduced interest costs.[528]

409. There are also qualitative benefits beyond lower interest costs that ratepayers will derive from Aquila achieving investment grade status as a result of Great Plains' acquisition. Those benefits are:

> (1) The strength to access, on reasonable terms, the long-term capital it needs under all market conditions; and
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> (2) Attractive costs on future short-term borrowing facilities on an unsecured basis, i.e., without the need to

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[524] GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5.

[525] GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5. Approximately $600 million of this debt was allocated at a blended interest rate of 6.78% (compared to an actual weighted average interest rate of 12.69%). The blended allocated rate reflected either (a) the actual all-in cost if the debt was issued when Aquila was still investment grade; or (b) the investment grade equivalent rate at the time of apportionment if the debt was issued when Aquila was not investment grade. The two issues that received the treatment in (b) included Aquila's $500 million, 14.875% Senior Notes and Aquila's $137.3 million, 9.95% Senior Notes. *Id*.

[526] *Id*. The $1.037 billion is $50 million higher than indicated in witness Cline's earlier testimony (see Cline Supplemental Direct, page 2, line 22), because Aquila reallocated funds to support necessary capital expenditures. *Id*.

[527] *Id*.

[528] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.

> pledge Missouri assets as collateral to creditors to support the transaction as is the case today.[529]

2. Controverting Evidence About Post-Merger Credit Worthiness

410. Public Counsel's witness Mr. Dittmer's[530] testimony regarding the company's credit-worthiness following the merger can be summarized in the following excerpt from his Rebuttal testimony:

> In summary, as much as I, Public Counsel, or this Commission might desire GPE/KCPL to maintain their investment grade rating and Aquila to return to an investment grade rating, it is difficult to envision any set of conditions that would facilitate such result given 1) the price being paid for Aquila's Missouri electric properties, 2) the significant level of transaction and transition costs estimated to be incurred, 3) the high cost of Aquila's debt – even after expected debt retirements – versus the amount of regulatory interest expense that should be allowed in retail rates, all relative to 4) estimated "true" or "created" merger savings. Because of these hurdles, the Public Counsel cannot envision enough conditions or safeguards being implemented as to adequately protect ratepayers from likely detriments stemming from the transaction. Accordingly, Public Counsel's position is to simply reject the entire merger and attendant regulatory plan.[531]

411. Even though Mr. Dittmer offered those criticisms, he also testified that: (1) the purchase price for Aquila "looks very reasonable";[532] (2) the reduction in Transaction Costs from $95 million to $65 million (Missouri jurisdictional $47.2 million) worked to increase the numbers positively;[533] (3) the Applicants' withdrawal of their request to recover Aquila's actual cost of debt changed his analysis of the potential benefits to consumers from a negative to a positive number (and his testimony does not even take into account the tax benefits Applicants will realize by assuming Aquila's debt);[534] and (4) because they are adjoining

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[529] *Id*.
[530] OPC Exh. 200, Dittmer Rebuttal, pp. 15-16.
[531] *Id*. at p. 15, line 20 to page 16, line 9.
[532] Transcript, p. 1694.
[533] Transcript, p. 1668.
[534] Transcript, p. 1667.

companies, Aquila and KCPL "should achieve more synergies than disjoined utilities,"[535] and, in fact, he "expect[s] there are some fairly significant synergy savings."[536]

412. Although Mr. Dittmer was critical of the merger because of interest expense and the effect of the transaction on the credit ratings of Great Plains, KCPL, and Aquila, Mr. Dittmer does not discuss, qualitatively or quantitatively, any potential interest cost, market access, or collateralization benefits from the merger on Aquila's future financing requirements, either in the first five years following the proposed merger or beyond. Mr. Dittmer limited his assessment to the effect of actual interest cost on Aquila's current debt portfolio in the first five years following the merger.[537]

413. Mr. Dittmer cites two individual items that, in his opinion, could result in a downgrade of Great Plains' and KCPL's credit ratings and, by extension, this would preclude Aquila from attaining investment-grade status as well. The items are (1) a write-off of merger "transaction costs;"[538] and (2) an inability to collect actual interest costs from ratepayers.[539] Moreover, as noted in Finding of Fact Number 404, Mr. Dittmer has changed his position with regard to many of the factors underlying his analysis.[540]

414. Mr. Dittmer's conclusions are purely speculative because it is impossible to predict the reaction of credit rating agencies to a single component of a transaction.[541] S&P and Moody's will assess the credit ratings of Great Plains, KCPL, and Aquila based on the affect of the merger in totality, not on any individual element. In doing so, they will be assessing the reduction in Great Plains' business risk that results from the transaction, the projected quantitative effects (i.e., the financial results and credit metrics, of the transaction over the next three to five

[535] Transcript, p. 1752.
[536] Transcript, p. 1723.
[537] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.
[538] OPC Exh. 200, Dittmer Rebuttal, pp. 15, 48.
[539] *Id*. at pp. 15, 48, and 49.
[540] Mr. Dittmer also admitted that his initial analysis failed to evaluate the merit of either the estimated Transaction or Transition Costs "because we didn't need to," having arrived at his preliminary negative conclusion. Transcript, pp. 1724-1727. Mr. Mills then interjected that because of Public Counsel's "limited budget, we have not had Mr. Dittmer do a whole lot of work since that time," having only paid him to do the "analysis on the original case" and not on the numbers now before the Commission. Transcript, pp. 1724-1725.
[541] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21; OPC Exh. 200, Dittmer Rebuttal, pp. 15-49.

years), and the qualitative attributes of the deal, particularly their views of regulatory support for post-transaction Aquila.[542]

415. Mr. Dittmer also testified to there being a possibility of what he termed a "death spiral":

> **Commissioner Murray:** Now, considering the detriments that you see from the revised plan and, as I interpret what you've said, all centering around a potential downgrade of KCP&L if the synergies aren't realized, can you envision conditions which would protect from those potential detriments?
>
> **Mr. Dittmer:** I guess the short answer is no. Where I get caught or hung up is, if the synergies aren't real, let's say the Commission issues an Order and says we will initially allow you to defer transaction and transition costs and we accept that you're never going to ask for high cost in interest cost, but we expect you to prove it up in the next rate case. Next rate case comes along and ultimately parties disagree that the synergies have been realized and, therefore, you determine that synergy savings won't cover all the costs they're trying to recover in this proceeding, and now there will be -- now there will be a hit to those financial matrix which drive the credit rating, credit rating agencies' opinion. And at that point if there's a downgrade, there's high cost interest that comes through the pipeline for the next rate case. At that point, it would seem you would say, okay, we never saw this one coming up. This is really a cost of them not being able to prove up, not realizing their synergy savings. Now we've not only got high cost debt on the Aquila side that we're going to pass on to ratepayers, we now have high cost -- a little higher cost debt on the KCPL/Great Plains side, and we're not going to allow recovery of that, and then you start moving into the so-called death spiral. That's the problem.[543]

416. Mr. Dittmer's "death spiral" testimony is found not to be credible and will be given no weight, because it was based upon the

[542] *Id*.
[543] Transcript, pp. 1687-1689.

hypothetical that no synergies would be realized and he has already testified in this matter that the merger would result in significant synergy savings.[544]

417. The Industrials' witness Mr. Brubaker's overall conclusion is outlined in his Rebuttal Testimony. He states that "the merger proposal and regulatory plan would be a detriment to customers and create unacceptable risks," therefore, "the proposed merger and regulatory plan should be rejected."[545]

418. There is no longer a regulatory plan to consider, and Mr. Brubaker did not update or supplement his testimony.[546] And like Mr. Dittmer, Mr. Brubaker does not discuss, qualitatively or quantitatively, any potential interest cost, market access, or collateralization benefits from the merger on Aquila's future financing requirements, either in the first five years following the proposed merger or beyond. He limited his assessment to the effect of actual interest cost on Aquila's current debt portfolio in the first five years following the merger.[547]

419. Like Mr. Dittmer and Mr. Brubaker, the Commission's Staff concludes, as outlined in the opening sentence of their report, that:

> The proposed transaction . . . will cause a net detriment to the public interest because the cost of service to establish rates for Missouri ratepayers of Aquila and KCPL, as a direct result, will be higher than the rates would be absent the proposed transaction.[548]

420. With respect to interest, and credit ratings, the Staff's Report does not discuss, qualitatively or quantitatively, any potential interest cost, market access, or collateralization benefits from the merger on Aquila's future financing requirements, either in the first five years following the proposed merger or beyond. Staff limited their assessment to the effect of actual interest cost on Aquila's current debt portfolio in the first five years following the merger.[549]

421. In the Executive Summary section of Staff's Report, Staff asserts that "GPE does not have the financial strength to acquire Aquila

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[544] Transcript, p. 1724-1727.
[545] Industrials Exh. 300, Brubaker Rebuttal, p. 3.
[546] Mr. Brubaker did not provide live testimony for the Commission, nor did the Industrials file any supplemental testimony.
[547] Industrials Exh. 300, Brubaker Rebuttal, pp. 1-14 and accompanying appendices; GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.
[548] Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 1.
[549] Staff Exh. 100, Schallenberg Rebuttal and Attached Report; GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.

and absorb Aquila's financial difficulties without seriously weakening GPE's financial condition."[550] In support of this position, the Staff Report includes an excerpt from the S&P Ratings Evaluation Service assessment done prior to Great Plains' announcement of the merger which lists several regulatory support considerations deemed important by S&P in achieving the indicated rating outcome.[551] Staff's implication, expressed in the Report is that only strong regulatory support of the merger would provide the appropriate safeguards to prevent a downgrade in Great Plains' and KCPL's credit rating.[552]

422. Staff's assertion, in Finding of Fact 414, is based upon a selective quote from the S&P report. The S&P report cited does not reference regulatory safeguards exclusively but also references "compensating modifications."[553] When questioned about other compensating mechanisms to help prevent a down grade, witnesses Bassham and Cline observed that there were always a number of alternatives available to the company for purposes of maintaining their credit rating, including, but not limited to: (1) different types of financing; (2) changing corporate structure such as selling a subsidiary (like Strategic Energy which Great Plains recently sold); and (3) evaluating and changing spending both from a capital and an O&M perspective.[554]

423. Staff's second assertion in its Staff Report is that "GPE's acquisition of Aquila will weaken KCPL's financial condition at a time when KCPL is committed to significant capital expenditures."[555] Notwithstanding Great Plains' placement on CreditWatch – Negative by S&P, the customary action with respect to an acquiring company when a merger is announced, KCPL readily accessed the long-term debt markets for $250 million in June 2007 and the tax exempt debt markets for nearly $150 million in September 2007 on attractive terms in both cases.[556]

424. KCPL's experience under CreditWatch since the announcement of the merger is not consistent with a "weakened" financial condition as posited by Staff.[557]

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[550] Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 1.
[551] GPE/KCPL Exh. 9, Cline's Supplemental Direct Testimony, Schedule MWC-4.
[552] Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 1-2; GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.
[553] *Id.*
[554] Transcript, pp. 2376-2377 and 2582.
[555] Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 1-2.
[556] GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.
[557] *Id*. See also Staff Exhs. 124 (HC), 125 (HC).

425. KCPL's credit ratings at Moody's have been entirely unaffected by the merger announcement.[558]

426. Staff's third assertion is that "[t]he GPE acquisition of Aquila will expose Aquila to GPE's current non-utility risk caused by GPE's affiliation with an unregulated competitive supplier of electricity, Strategic Energy, L.L.C.,"[559] Staff is referring to a potential risk to Aquila's credit rating that might arise from S&P's "consolidated rating methodology" whereby subsidiary credit ratings can be influenced by changes in the credit rating of the parent company.[560] There is nothing in the S&P assessments that supports Staff's assertion of an increase in Aquila's risk related to Strategic Energy. S&P indicated that Aquila's Business Risk Profile, currently "6", would remain "6" post-merger.[561] In addition, Strategic Energy was sold on June 2, 2008, for $305 million providing Great Plains a working capital adjustment.[562]

a. Changes in Key Assumptions Utilized by the Credit Rating Agencies

427. Several of the assumptions, taken under consideration by S&P's and Moody's, as provided by Great Plains and KCPL in January 2008 when the agencies made their projected ratings outcome predictions and set out in S&P's and Moody's letters to Great Plains and KCPL, have changed.[563]

428. The Applicants filed additional testimony on February 25, 2008 outlining their revised merger proposal: (1) withdrawing their request for approval of recovery of interest costs associated with non-investment grade Aquila debt and instead proposing to follow the debt interest cost recovery procedure utilized in the most recent Aquila rate case, (i.e., any non-investment grade debt of Aquila will be assigned for purposes of setting retail rates and investment-grade interest rates for comparable debt); (2) withdrawing their request for approval of a specific

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558 *Id*.
559 Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 2.
560 Staff Exh. 100, Schallenberg Rebuttal, Attached Report, p. 1; GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 1-21.
561 GPE/KCPL Exh. 10, Cline Surrebuttal, pp. 17-18. See in particular Schedules MWC-4 and MWC-5 of Cline's Supplemental Direct Testimony. Staff Exhs. 124(HC), 125(HC). Strategic Energy was sold on June 2, 2008, for $305 million providing Great Plains a working capital adjustment. Transcript, p. 3163. See also Staff Exhs. 136 and 137.
562 Transcript, p. 3163. See also Staff Exhs. 136 and 137.
563 Transcript Vol. 18(HC), Bassham, pp. 2335-38, 2357-2361; Ex. 38(HC), Schedule MWC-18(HC), p. 9; and Schedule MWC-19(HC), p. 9. See also Staff Exhs. 124(HC), and 125(HC).

synergy savings plan, i.e., retention of 50% of purported operational synergies, and replacing it with a proposal to utilize the natural regulatory lag between rate cases to retain any portion of synergy savings; (3) withdrawing their request for approval of an additional amortization for Aquila similar to the KCPL Regulatory Plan additional amortization; and (4) withdrawing their request for recovery of certain transaction costs - change in control costs and rabbi trust, representing Aquila's supplemental executive compensation plan, thus decreasing transaction and transition costs.[564]

429. The rating agencies' projections did not include an evaluation of the changes in the merger proposal described in items 3 or 4 in Finding of Fact 421.[565]

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[564] *Id*. GPE/KCPL Exh. 37, Bassham Additional Supp. Direct, pp. 1-6. The Industrials cite to several other changes in key assumptions provided to the credit rating agencies, but the Industrials appear to be referring to assumptions for the 2007 credit rating projections. One of those changes involved the sale of Strategic Energy, L.L.C., i.e. because of its recent sale it will no longer provide annual revenues. Other changes in key assumptions from the 2007 projections include: (1) no issuance of $250 million of hybrid securities in 2007, however, this is still being considered this for the future (Transcript, p. 2377); and (2) Aquila did not receive a 2007 rate increase of 14.1% but rather received one of 11.9%. It appears these changes were all taken into consideration by the agencies in the January 2008 projections. See Exhs. 124 and 125(HC). One other assumption has obviously changed -- the merger did not close in the first quarter of 2008 because this Commission was still evaluating the Applicant's request to approve the merger.

[565] See Staff Exhs. 124, 125, Schedules MWC-5, 18, and 19. See also Findings of Fact Number 460. For changes in the merger plan see EFIS Docket Number 386, *Identification of Evidence that is No Longer Relevant to the Joint Application*, filed by Great Plains and KCPL on May 9, 2008, pursuant to the Commission's order, EFIS Docket Number 313, Order Directing Identification of Irrelevant Evidence, effective April 18, 2008; EFIS Docket Number 234, *Motion for Leave to File Additional Supplemental Direct Testimony and Notice of Withdrawal of Certain Regulatory Plan Requests*, filed February 25, 2008 by Great Plains and KCPL. The Commission notes that Public Counsel, in its brief, takes exception with the Commission relying, in any way, upon Schedules MWC-18(HC) and MWC-19(HC) because witness Cline was unable to answer certain questions with regard to specific items on those schedules. See Transcript, pp. 2543-2622. However, the two exhibits in question, involving the January 2008 presentations to S&P's and Moody's, mirror the same information contained in Staff's Exhs. 124 and 125 and contain the "Key Assumptions" utilized by the credit rating agencies when offering their projections in January 2008. Mr. Cline's inability to answer specific questions regarding individual line items in the Schedules, which as a standard company practice were prepared by other company experts, does not diminish the evidentiary value of the Schedules themselves, especially in light of Staff's collaborating evidence in Exhs. 124 and 125. Moreover, Public Counsel has relied on these exhibits to support its arguments that certain Key Assumptions were not evaluated by the credit rating agencies, and cannot now be heard to complain to the use of the same documents to confirm what Key Assumptions actually were evaluated by the agencies.

430. The rating agencies projections did include assumptions for future additions to rate base,[566] and did include an assumption that Strategic Energy would be sold, although the assumptions were that it would sell for a lesser amount than the sale netted. Pressure on cash flow was offset by the sale of Strategic Energy for $305 million.[567]

431. On March 20, 2008, S&P upgraded Aquila's credit rating to a double B minus, and Aquila remained on "credit-watch positive" status.[568]

432. This upgrade was not hindered by Aquila not having a regulatory plan in place involving accelerated amortization because other options are available to Aquila to relieve pressure on cash flow.[569]

b. Cost and Schedule of the Iatan Construction Projects

433. Another issue interrelated to the credit-worthiness of the Applicants relates to whether management of the infrastructure projects of the CEP (the Iatan Unit 1 and Unit 2 projects) in conjunction with the merger created a risk of a downgrade of the Applicants' credit ratings.[570]

434. Prior to the release of the reforecast of the costs and schedule of the Iatan projects, Mr. Bassham testified that the cost and schedule estimates for Iatan 1 and 2 compiled at the end of April did not present undue risk to Great Plains Energy and KCPL, and that the companies possessed sufficient financial flexibility to consummate the merger and carry out the projects.[571]

435. As KCPL President William H. Downey testified, these increases in costs and minor delays in schedule are the product of an "extraordinary period" of labor and construction industry issues. The electric utility industry, not just in the United States, but worldwide, is in a building mode, which has increased demand not only for the sophisticated equipment needed to build power plants, but also for

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[566] Mr. Bassham testified that those assumptions involved the addition of the environmental add to Iatan 1, the environmental add for Aquila at Sibley, and the 09 for the addition of Iatan 2. Transcript 2339 Volume 18(HC) – this portion declassified on June 24, 2008. Additionally there was an assumption that the Crossroads facility would be placed in rate base, but currently there is no availability to get transmission from this generating facility into Aquila's Missouri service area. Transcripts pp. 2857-2859. See also Volume 20(HC) pp. 2554-2555.

[567] Transcript, p. 3163; Staff Exhs. 124 and 125, See also Schedules MWC-18(HC) and MWC-19(HC).

[568] Staff Exhibit 137.

[569] Transcript, pp. 2597-2600.

[570] See Transcript Volumes 19, 20, 21, and 22.

[571] Transcript, pp. 2380-2384.

labor.[572] Inflation is on the rise, and the value of the U.S. Dollar has fallen.[573]

436. Chairman of the Board Michael Chesser advised the Commission that even in light of these economic trends, he believed that Great Plains and KCPL would remain financially strong post-merger and that, based on discussions with rating agencies, a credit downgrade was "very unlikely."[574]

437. Mr. Chesser noted that with Aquila's debt being reduced, additional assets being placed in rate base, "significant growth" in Aquila's service area, and the sale of Strategic Energy, the rating agencies are viewing Great Plains "as a pretty positive story."[575]

438. Mr. Michael Cline, KCPL's treasurer, echoed these sentiments, stating that the results of the reforecast were not likely to have a negative effect, and there is no evidence of such a decline to-date.[576]

439. KCPL witnesses involved in the Iatan construction projects emphasized the utility's efforts to keep a strict account of cost issues through an evaluation of risks and opportunities through what are known as Risk and Opportunity Tables, as well as a comprehensive reforecast process.[577]

440. KCPL has recruited highly qualified individuals to manage the Iatan construction projects and retained competent outside experts to review the decisions being made.[578]

441. Terry Foster, Director of Project Controls at Iatan, has spent over 40 years in the electric utility industry.[579]

442. Brent Davis, now Iatan 1 Project Director, has worked on Iatan 1 and 2 projects since June 2006.[580]

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[572] Transcript, pp. 2479-2481, 2484; Industrials Exh. 305, Securities and Exchange Commission Form 8-K, p. 2.

[573] *Id*.

[574] Transcript, p. 2528, 2539-40.

[575] Transcript, p. 2539-40.

[576] Transcript, p. 2585.

[577] Transcript, pp. 2467-2484 (Downey); 2715-28 (Davis); 2756-62 (Foster).

[578] *Id*.

[579] Transcript, p. 2755. In the last ten years Mr. Foster worked for Fluor Daniel as the project director for a standalone project with Carolina Power & Light, was director of project controls for all capital projects at American Electric Power Co., and was the regional quality control manager for projects overseen by Black & Veatch. Transcript, p. 2755.

[580] Transcript, pp. 2713-2714. Mr. Davis has worked for KCPL since 1980 at all four of its coal-fired power plants, and most recently served as plant manager at Hawthorn 5. Transcript, pp. 2713-2714.

443. Both Mr. Foster and Mr. Davis testified that their full attention is devoted to the Iatan projects, that they are not involved with the acquisition of Aquila or related creditworthiness issues, and that they do not serve as members of any merger integration team.[581]

444. A new vice president of construction has been hired to replace the manager, who had started the reforecast process in 2007 but resigned in February to re-join the non-regulated utility sector.[582]

445. Witnesses James Rose, Aquila's Senior Manager in the Risk Assessment Audit Service Department and Max Sherman, Aquila's Vice President of Strategic Initiatives provided testimony regarding statements made at the February 14, 2008 joint owners'[583] meeting discussing the Iatan 1 construction project. These witnesses attested to statements made at this meeting that the upcoming budget reforecast numbers for the Iatan project were not based in "reality."[584] However,

581 Transcript, pp. 2746-2747, 2752 (Davis); 2754, 2799-2800 (Foster).

582 Transcript, pp. 2487-2489, 2708.

583 The Joint Owners of Iatan 1 include Aquila, KCPL, and the Empire District Electric Company.

584 Transcript, Volume 21, pp. 2805-2834. See in particular pp. 2822 and 2826. See also Staff Exh. 146.

James Rose has worked for Aquila for eight years. Prior to working for Aquila, he worked for ten to eleven years with United Cities Gas Company in various positions. He worked in the regulatory group, in internal auditing, and in operations. He spent two years in Applebee's internal audit group, and then came to Aquila. He started out as a senior auditor and progressed up to his current position. He has earned a Bachelor of Science Degree in Accounting and is a Certified Public Accountant. He has performed construction audits, but not at the magnitude of Iatan. He has also been to a number of training seminars through the Institute of Internal Auditors and other organizations.
Transcript, Volume 21, pp. 2835-2884. See in particular p. 2849.

Max Sherman, in his role as Aquila's Vice President of Strategic Initiatives, is the co-owner representative for the company on Aquila's minority-owned interests in a couple of coal projects: the Iatan station of which KCPL is the primary owner, and the Jeffrey Energy Center in Saint Maries, Kansas, in which Aquila has a small ownership share. He was responsible for filing special use permit applications for South Harper and also led the development effort for the potential expansion site in Sedalia, Missouri. He has been employed by Aquila for a total of approximately ten years. Former positions include being an owners' representative on a dormitory construction job in grad school; four years with Commonwealth Edison on the Clinch River Breeder Reactor as cognizant engineer; senior staff for the owner of the Grand Gulf Nuclear Station in Port Gibson, Mississippi; power marketer for Entergy; asset manager for 809 megawatts of utility generation; developer of the Aries Power Plant and of Crossroads Energy Center in Clarksdale, Mississippi, a 308-megawatt peaking station in Clarksdale; and was a consultant through Tyr Energy out of

these witnesses did not provide any testimony based upon their individual expertise that objectively quantified any budgetary implications for the construction project or any specific time constraints that could affect the Applicants' credit ratings.[585]

446. The public statements issued by Great Plains and KCPL on May 7, 2008, disclosed that while overall projected costs rose by 19%, Iatan 1 will experience a delay of 47 days to February 1, 2009, and Iatan 2 remains on schedule to be completed in the summer of 2010.[586]

447. KCPL's share of the cost of the Iatan 1 environmental retrofits increased from the previous estimated range of $255-264 million to $330-350 million, a 33% rise from the top end of the prior estimate.[587] The mid-point estimate is a 28% increase.[588]

448. The cost estimate for Iatan 2 experienced a mid-point increase of 10%, from the control budget estimate of $1.685 billion to $1.861 billion.[589]

449. KCPL's approximately 55% share of Iatan 2 has increased from the previous 2006 range of $837-914 million to a range of $994 million to $1.050 billion, with the top end of the range representing a 15% increase.[590]

c. Company Testimony

450. Both Great Plains Chairman Chesser and KCPL Treasurer Cline believed that a downgrade in the credit ratings would not occur even given the changes in the original assumptions.[591]

451. During the hearings, Mr. Bassham testified that he was "very confident" that the credit ratings of KCPL and Great Plains "would remain consistent with the information we discussed with Moody's and Standard & Poor's" earlier in 2008.[592] He also testified that he did not believe that a down grade is "likely" by Moody's, particularly since its credit rating of Baa2 "is one notch above Standard & Poor's."[593]

Overland Park, Kansas, assisting Aquila's Merchant business. Currently he is responsible for oversight or monitoring of Iatan on behalf of the minority owner.

[585] *Id*.
[586] Industrials Exh. 305, Securities and Exchange Commission Form 8-K, pp. 2-3; Transcript, pp. 2380-2381.
[587] Industrials Exh. 305, Securities and Exchange Commission Form 8-K, p. 2-3.
[588] Transcript, p. 2381.
[589] Transcript, pp. 2380-2381.
[590] Industrials Exh. 305, Securities and Exchange Commission Form 8-K, p. 2-3.
[591] Transcript, pp. 2539-2540 (Chesser); and p. 2585 (Cline).
[592] Transcript, p. 2139.
[593] Transcript, pp. 2322-2323.

452. Although Moody's had recently placed the companies on a negative outlook, Mr. Bassham explained that this was not a down grade, but rather an indication of concern as a "result of the [Applicants'] revised [merger] request" and "the fact that [the companies] had agreed to absorb [Aquila's] interest costs [which] would cause there to be less flexibility…."[594]

453. Given that credit ratings are not normally changed because of a single event and that multiple factors are included in a rating agency's review, Mr. Bassham concluded that under the Applicants' revised regulatory requests, "with all the work we've done, we don't see the merger in and of itself causing a downgrade."[595]

454. On April 29, 2008, when asked if he had an opinion as to how likely he thought that a downgrade may result from approval of this transaction, the following exchange occurred:

> **Mr. Mills:** Okay. Do you have an opinion today as to how likely you think it is that a downgrade may result as -- from approval of this transaction in Missouri?
>
> **Mr. Chesser:** I think it's very unlikely that a downgrade would result. And it's based on, as I said before, not only the letters and advice that we've gotten from the Commission, but also my -- from the rating agencies -- but my experience in working with them through the years. You know, I think they look at the longer view, not just the short term, and I think they see in our long-term picture the Aquila debt working off, Strategic Energy being sold, additional assets being put in the rate base, significant growth from the Aquila service area. So I think that all adds up. I believe that all adds up into their eyes as a pretty positive story.
>
> **Mr. Mills:** So in other words, you think it's a very minimal risk that a -- that a downgrade will result from this merger?
>
> **Mr. Chesser:** I do.[596]

455. Although Great Plains and KCPL senior management express confidence that Great Plains and KCPL will not experience a downgrading from the credit rating agencies as a consequence of the acquisition of Aquila, they stated that there was some risk that a

[594] Transcript, pp. 2321-2322.
[595] Transcript, p. 2324.
[596] Transcript, pp. 2539-2540.

downgrade would result by the rating agencies from approval of the transaction as presently proposed by the Applicants.[597]

456. Great Plains and KCPL senior management also indicated that they did not think it was appropriate to have the shareholders fund the costs of any credit rating downgrading.[598]

d. Crane Accident

457. On May 23, 2008, a Manitowoc 18000 crane (the "Crane") being used to install environmental upgrades on the Iatan construction projects collapsed.[599]

458. At the time of its collapse, the Crane had just been wind tested, it was not bearing any load and it was being lowered, having determined that it was too windy to lift the ductwork that had been planned.[600]

459. When the Crane collapsed, four people were injured, one fatally. The injured individuals were employees of Aerotech and Alstom Power Incorporated. They were not Aquila or KCPL employees.[601]

460. Construction was halted, appropriate emergency personnel were dispatched and the Occupational Safety and Health Administration ("OSHA") restricted access to the damaged Crane to perform an investigation. OSHA released the site surrounding the Crane on June 10, 2008.[602]

461. Construction personnel returned to the worksite on May 27, 2008, and continued with other duties, the day after the Memorial Day holiday.[603]

462. Demolition of the damaged Crane will take approximately 10 to 12 days and alternatives are being considered to continue with the installation of the environmental upgrade.[604]

463. The evidence in the record indicates that the accident, while creating a challenge for the construction projects, should not have

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[597] Transcript, pp. 2539-2541 (Chesser); pp. 2497-2504 (Downey); and pp. 2320-2325 (Bassham).
[598] Transcript, pp. 2539-2541 (Chesser); pp. 2496, 2598, 2599 (Downey); and pp. 2319-20, 2321, 2323-25 (Bassham).
[599] Transcript, pp. 3152-3153.
[600] Transcript, pp. 3149-3155.
[601] Transcript, p. 3156.
[602] Transcript, pp. 3158-3159.
[603] Transcript, p. 3185.
[604] Transcript, pp. 3187-3191.

an effect on either the projected completion dates or exceed the allocated contingency funds.[605]

464. There is no competent, credible evidence in the record that the crane accident will affect the schedule for completion of the construction projects or increase costs beyond contingency planning.[606]

465. There is no competent, credible evidence in the record that the Crane accident will affect the credit ratings of Great Plains, KCPL or Aquila.

3. "Additional Amortizations"

466. The Applicants withdrew their request that the Commission approve a regulatory or "additional" amortization provision for Aquila and instead intend to initiate discussions, post-close of the transaction, with interested parties to develop a regulatory plan for Aquila that might include an amortization provision as part of that regulatory plan.[607]

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[605] Transcript, pp. 3191-3195.

[606] Transcript, Volumes 25-26.

[607] GPE/KCPL Exh. 37, Bassham Additional Supp. Direct, p. 4. Mr. Bassham explained to Commissioner Clayton that while the Applicants are not asking for a specific regulatory amortization treatment in this case, "we would like ... to work with the parties to develop a plan similar to what we did with KCPL. Assuming we're not able to achieve that, we might propose our own plan in the first rate case." Transcript, pp. 1312-1313.

Because the request was withdrawn, Public Counsel's witness **Russell Trippensee's** testimony (Public Counsel Exh. 201) is predominantly irrelevant, except to the extent that it could demonstrate that Great Plains' and KCPL's credit-worthiness would decline as a result of not having an additional amortization regulatory plan approved, and the Commission finds that his testimony fails to establish such a scenario. Mr. Trippensee also testified that "[t]here's no tracing of debt to specific investments at all." Transcript, pp. 2967-2968. He stated that when the ratios and formula are in place and after the Commission sets rates on a traditional basis in a future rate case, only then would the Additional Amortization process be used "to reflect the additional cash flow necessary to meet ... that ratio target that was set out in the plan ...." Transcript, p. 2978.

Russell W. Trippensee is the Chief Utility Accountant for the Missouri Office of the Public Counsel. He is a Certified Public Accountant, Missouri certificate/license number 2004012797. He attended the University of Missouri at Columbia, from which he received a BSBA degree, major in Accounting, in December 1977. He also completed the requisite hours for a major in finance. He attended the 1981 NARUC Annual Regulatory Studies Program at Michigan State University and has attended numerous seminars and conferences related to public utility regulation. From May through August, 1977, he was employed as an Accounting Intern by the Missouri Public Service Commission. In January 1978 he was employed by the Commission as a Public Utility Accountant I. He left the MPSC staff in June 1984 as a Public Utility Accountant III and assumed his present position. He has served as the chairman of the Accounting and Tax Committee for the National Association of State Utility Consumer Advocates from 1990-1992 and is currently a member of the committee. He is also a member of the Missouri Society of Certified

467. There is no current, applicable or relevant additional amortization provision or plan in the evidentiary record for the Commission to evaluate when considering the merger application.[608]

4. Actual Debt Cost Recovery

468. There is no current, applicable or relevant proposal for recovery of Aquila's actual debt interest in the evidentiary record for the Commission to evaluate when considering the merger application, because the Applicants have withdrawn their request with respect to recovery of Aquila's actual debt interest based on past commitments made by Aquila with respect to certain specific debt issues.[609]

469. Great Plains has quantified the effect of not recovering actual debt interest on the Aquila debt portfolio under the "no refinancing" assumption. The difference between actual and regulatory debt interest costs, under the "no refinancing" assumption, as well as other

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Public Accountants. While employed with the Commission, he supervised and assisted with audits and examinations of Missouri public utility companies with regard to proposed rate increases. In the Public Counsel's Office, he is responsible for the Accounting section and performs audits and examinations of public utilities. He previously testified before the Commission.

[608] Testimony from both Michael Cline (GPE/KCPL) and Robert Schallenberg (Staff) confirmed that any cash flow from Additional Amortizations was "fungible," and not specifically separated out or directed to specific capital investments or other utility projects. Transcript, pp. 2956, 2958 (Cline); Transcript, pp. 2994-96 (Schallenberg). Mr. Schallenberg agreed with Commissioner Clayton that the "focus" of Additional Amortizations "is less on the actual dollar amount that's going into construction but more on the credit metrics" of the utility's regulatory plan. Transcript, p. 2995. Mr. Schallenberg noted that in KCPL's case the cash flow from Additional Amortizations "doesn't identify Iatan 2" or any other construction project and "isn't designed to specify ... different power plants." Transcript, p. 2994. He observed that arriving at amounts for Construction Work in Progress, if it were permitted in Missouri, would involve "calculations [that] are completely different." Transcript, p. 2997. "In fact, if you were really trying to isolate part of an entity's construction activities, you probably wouldn't want to use the [Additional Amortization's] formula approach." Transcript, p. 2996.

[609] GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5. With regard to recovery of debt repurchase costs, the initial merger plan was to use a combination of cash remaining from the Black Hills sale and new hybrid debt issued by Great Plains Energy to retire all but one of Aquila's currently outstanding long-term debt issues, *i.e.*, the $500 million Senior Notes that mature in July 2012. The Applicants' initial request included this cost in the total actual interest cost they sought to recover in rates; however, a re-evaluation of the Applicants' position with respect to actual interest, as well as the collapse of the hybrid debt market in the last few months of 2007, led Great Plains to reconsider the refinancing strategy previously articulated. Great Plains does not plan to move forward with refinancing any of Aquila's existing debt post-closing that would give rise to debt repurchase costs for which it would seek recovery from Missouri customers. GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5.

assumptions regarding projected rate base growth at Aquila and debt apportionment methodology, is approximately $120 million over the 2008–2012 period.[610]

470. As previously found, the Applicants propose to use the established process for apportionments of the remaining debt in future rate cases as Aquila's Missouri rate base increases.[611]

471. Applicants' withdrawal of their request to recover all of Aquila's actual debt costs will not have an adverse effect upon KCPL's credit-worthiness.[612]

H. Findings of Fact Regarding Service Quality

472. Both Aquila and KCPL have received multiple awards for service quality.[613]

473. KCPL was recently awarded the National Reliability Excellence Award by PA Consulting (October 2007); the EEI Edison Award; the EEI Outstanding Customer Service Award for Mid-Sized Utilities (May 2007); and is ranked Number Three in the Midwest by JD Power for Customer Service Satisfaction for Business Customers (March 2007).[614]

474. Aquila was also recently awarded the JD Power award for Outstanding Customer Service Experience (September 2007).[615]

475. To ensure quality service, KCPL and Aquila are expending significant resources during the nearly one year prior to actual integration to plan the merger.[616]

476. This significant investment in planning and employee time will help ensure that the proper plans are put in place and proper risks mitigated.[617]

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[610] *Id*. See in particular Schedule MWC-17(HC). Cline Additional Supp. Direct, p. 4. With the recovery of actual interest and the net debt reduction that would have resulted from the refinancing strategy no longer part of the proposal, Great Plains and KCPL would retain their current credit rating and Aquila would achieve an investment grade credit rating upon the closing of the merger. GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5. Copies of Great Plains' presentations to S&P and Moody's are attached as Schedules MWC-18(HC) and MWC-19(HC), respectively.

[611] GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5.

[612] GPE/KCPL Exh. 38, Cline Additional Supp. Direct, pp. 1-5.

[613] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. See generally Transcript, pp. 2200-2237.

[614] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19. See in particular Schedules JRM 9-12.

[615] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[616] *Id*.

[617] *Id*.

477. This significant lead time on quality service planning will ensure that merger integration is conducted at a measured pace rather than an overly aggressively one.[618]

478. KCPL employees have engaged in integration planning activities since the due diligence phase of the process in July, 2006. This timing means that KCPL employees will have spent over 18-24 months planning for the merger and considering service quality issues by the time the merger closes.[619]

479. Specific measures being taken within Customer Service include:[620]

> (1) KCPL has reached agreement with Jim Alberts to lead Customer Service operations for both companies. Mr. Alberts is a key reason for Aquila's successful, and award winning, customer service operations.
>
> (2) KCPL will provide incremental Customer Service Representatives at the time the merger closes to ensure a smooth transition. This action will help avoid any service quality degradations that stem from underestimating the demands of the newly integrated companies and the uncertainties that customers face in the post-merger environment.
>
> (3) The merger will leverage the best practices of KCPL and Aquila to ensure the best possible service.[621]
>
> (4) Operations will be integrated in Raytown for a single location from which to conduct Customer Service operations. To further mitigate potential risks, the decision has been

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[618] *Id*.
[619] *Id*.
[620] *Id*.
[621] *Id*. As an example, on the Sibley Unit 1 and Unit 2 opportunity, KCPL will use its significant combustion engineering and outage planning experience. This knowledge has been demonstrated at KCPL plants and will be essential if Sibley is to realize higher output. A similar combustion improvement project on LaCygne Unit 1 resulted in increased operating capacity. KCPL will apply tested and proven technical resources together with in-house-developed methodologies. Additionally, the optimization for Sibley Unit 1 and Unit 2 will eliminate or reduce the need for fall cleaning outages. None of the Aquila units have intelligent sootblowing, so all can benefit. *Id*.

> made to use separate customer information systems from Day 1. This will enable Customer Service Representatives to use a familiar interface and it will ensure that there are no data conversion issues. Over time, the customer information systems will be migrated to a common interface. Prior to that point, employees will have ample time to train on the new system to facilitate a smooth transition.[622]

480. Service quality will be measured by service quality metrics following the merger. Key metrics such as customer satisfaction and reliability (*e.g.*, System Average Interruption Duration Index ("SAIDI")) will be measured to gauge progress.[623]

1. Management Structure

481. With regard to service quality issues and the management structure following the merger, very little change will occur within Great Plains Energy or KCPL executive management. Personnel placements that are planned include: (1) Michael Chesser will remain Chairman of the Board of Great Plains Energy and KCPL, as well as Chief Executive Officer of Great Plains; (2) William H. Downey will remain President of Great Plains Energy and KCPL, as well as Chief Operating Officer of Great Plains Energy and Chief Executive Officer of KCPL; (3) William H. Downey will become President and Chief Executive Officer of Aquila; (4) the membership of the Boards of Directors of Great Plains and KCPL will be unaltered; (5) Great Plains Energy's corporate headquarters will remain at 1201 Walnut; (6) Aquila corporate employees will relocate to Great Plains Energy's existing office space and other facilities; (7) there will be little to no change in the senior management team of Great Plains and KCPL; and (8) while there will be no immediate reduction in current union employees, the companies anticipate eliminating approximately 250-350 overlapping administrative, management and support positions over a five (5) year period.[624]

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[622] Transcript, p. 2220. Additionally, Great Plains and KCPL have taken the proper steps to ensure that the integration of the companies' IT systems will be transparent to the external customer and will have minimal impact on the internal users of IT services. GPE/KCPL Ex. 27, Tickles Supp. Direct, p. 3.

[623] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[624] GPE/KCPL Exh. 13, **Downey Direct**, pp. 1-9.

William H. Downey is President, Chief Operating Officer, and a member of the Board of Directors of Great Plains, the holding company of KCPL. He is also the President and Chief Executive Officer of KCPL. His responsibilities include overall management of all

482. The acquisition of Aquila complements Great Plains' current operations because: (1) Aquila's Missouri electric utilities are not only adjacent to KCPL's service territory, but also would fill in the gap that currently exists between KCPL's East District and the rest of its service territory, thereby creating significant savings opportunities; (2) KCPL and Aquila have had a working relationship for many years, being joint owners of the coal-fired Iatan 1 generating plant and of the coal-fired Iatan 2 generating plant, which is now under construction; (3) Aquila's financial condition after the merger is anticipated to satisfy the financial metrics necessary to support an investment-grade credit rating, lowering debt costs to Aquila and supporting greater access to capital markets on more reasonable terms for Aquila; and (4) the merger is anticipated to improve the overall business risk profile of Great Plains because Great Plains will own a higher percentage of regulated business than it does currently and will also spread the business risk of its nuclear assets over a broader asset and revenue base.[625]

483. With regard to the effect the merger will have on customers and communities served by KCPL and Aquila in Missouri: (1) KCPL ranks in the top tier of performance in nearly every category typically benchmarked by utilities, including production cost, reliability, distribution cost to serve per customer, and is nearing top-tier in customer satisfaction; and, (2) it is Great Plains' and KCPL's objective to combine management practices and resources to achieve significant reduction in costs and further enhance reliability and customer satisfaction, with rates lower than they would have been had the merger not occurred.[626]

2. Field Operations

484. The combined companies will have a customer base of approximately 805,000 customers. [627]

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aspects of Great Plains and KCPL. He holds a Bachelor of Science degree from Boston University, a Master of Science degree from Columbia University and a Master of Business Administration degree from the University of Chicago. He began working for KCPL in 2000 after 28 years of electric utility experience. He was named to his current position in October of 2003. Prior to joining KCPL, He served as vice president of Commonwealth Edison and president of Unicom Energy Services Company, Inc., an unregulated energy marketing and services company operating throughout the Midwest. He has testified before the Commission in KCPL's 2006 Missouri rate case.

[625] *Id*.

[626] *Id*.

[627] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22. See generally Transcript, pp. 2238-2316.

485. KCPL will pool the combined operational work force to more efficiently address customer needs. [628]

486. KCPL's focus on the construction, maintenance, operation, and restoration of the electric system will be balanced across all communities whether metropolitan or rural. [629]

487. Union employees in field forces will not be reduced with this combination, but will be reassigned in a more balanced approach to the new, combined customer base.[630]

488. While Great Plains and KCPL do expect to reduce employee levels as a result of the transaction, all of the distribution and customer service collective bargaining unit employees will be employed by KCPL from the outset. The majority of the reductions in the distribution and customer service areas are from reductions in redundant administrative/clerical positions or middle and senior management.[631]

489. The combined service territory will be divided into geographic areas known as districts. Within each district, employees will operate from multiple service centers.[632]

490. The greater Kansas City metropolitan area will be managed as a single district. The district will include customers from just north of the Kansas City International Airport to points south including Johnson County, Kansas and Peculiar, Missouri. It will also cover from the eastern edge of Blue Springs, Missouri to points west including Olathe, Kansas. This area will comprise approximately 627,000 customers.[633]

491. Currently, both companies serve the Kansas City District from eleven service centers. The combined operation will serve this district from six service centers. [634]

492. Although the number of customer service centers will be reduced from eleven to six, each district will have satellite offices so that service representatives will be employed throughout the rural areas of the utilities' respective service territories.[635]

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[628] *Id*.
[629] *Id*.
[630] *Id*.
[631] Transcript, p. 2297.
[632] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22. See Schedule WPH-1 for a combined map of the districts.
[633] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22.
[634] *Id*.
[635] Transcript, p. 2219; GPE/KCPL Ex. 17, Herdegen Supp. Direct, p. 11.

493. None of the nine service centers in more rural areas (St. Joseph, Maryville, Trenton, Henrietta, Marshall, Sedalia, Warrensburg, Clinton and Nevada) will be closed.[636]

494. Given the extensive interstate highway system in the area, and the KCPL approach of 24/7 shift coverage for emergency response, KCPL expects its customers will encounter improvements in service delivery.[637]

495. The sharing of resources and shifting of work project assignment can be accomplished more efficiently with larger work groups in fewer locations.[638]

496. In storm situations, the combined resources of both companies can be redirected in a balanced approach to all customer outages, and stronger focus can be placed on the most severely damaged areas.[639]

497. In the further reaches of the Kansas City District, Aquila currently has first responder employees who take their trucks home to speed response. These areas (Buckner, Drexel, Adrian) will continue to see this dedicated service in the combined companies. This service will be extended to the areas of Platte City and Weston. [640]

498. Beyond the Kansas City metropolitan area, the new company will operate in four additional districts, East, Southeast, South, and North.[641]

499. The South District will be operated as it is today in KCPL serving approximately 30,100 customers. This area is mainly known as the Paola – Ottawa, Kansas area of the company.[642]

500. The North District will be operated as it is today in Aquila serving approximately 68,500 customers. This area is mainly known as the St. Joseph – Maryville/Mound City – Trenton, Missouri area of the company. [643]

501. The East District of the company will combine areas of both Aquila and KCPL. This continuous geographic area will include approximately 39,300 customers from Henrietta and points east to Carrolton and Glasgow, Missouri and points south including Sedalia,

[636] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22, see in particular p. 12.
[637] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22.
[638] *Id*.
[639] *Id*.
[640] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22; Transcript, p. 2270.
[641] *Id*.
[642] *Id*.
[643] *Id*.

Missouri and Benton County. The current service centers of both companies will continue to operate in this area. They are located in Henrietta, Marshall, and Sedalia, Missouri.[644]

502. The Southeast District of the company will include areas currently served by Aquila. This area will include approximately 40,200 customers from Lone Jack and Warrensburg to points south including Clinton and Nevada, Missouri. The current service centers in this area, located in Warrensburg, Clinton, and Nevada, will continue to operate and serve the customers effectively.[645]

503. These five operating areas, although different in customer size and area, will be operated as an integrated organization.[646]

504. The critical support functions such as system engineering, materials supply, and dispatch operations will be centralized to provide stronger, more focused execution of the work. The employees in these groups will be able to share practices, priority issues, and real-time problems on a daily basis. Situations that arise in one area will be understood by the group and can be addressed across the entire 17,900 square miles of territory.[647]

3. KCPL Reliability Measures

505. The Standard Institute of Electrical and Electronics Engineers ("IEEE") benchmarks of System Average Interruption Duration Index ("SAIDI"), Customer Average Interruption Duration Index ("CAIDI"), and System Average Interruption Frequency Index ("SAIFI") will be used to monitor performance of the system. KCPL will increase the number of existing IEEE benchmarks as technology develops, allowing it to enhance its ability to monitor performance.[648]

506. KCPL will continue using IEEE Standard 1366, Guide for Electric Power Distribution Reliability Indices, at KCPL and start using the same standard in the new Aquila territory to ensure a consistent approach has been taken toward future reporting.[649]

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644 *Id*.
645 *Id*.
646 *Id*.
647 *Id*.
648 *Id*.
649 *Id*.

507. KCPL and Aquila have reviewed the past three years of existing normalized data to determine their independent averages and the new average for the combined territories as noted below.[650]

	KCPL	Aquila	Combined
SAIDI	60.6	143.8	90.5
CAIDI	89.1	91.6	90.5
SAIFI	0.68	1.57	1.0

508. Post-merger KCPL will use one system to track both service territories and will focus on improving reliability performance for the customers who have experienced the most outages.[651]

509. KCPL and Aquila have reviewed the practices for tracking their worst performing circuits. The circuits have been identified based on data from outages and detailed patrols and improvements are in progress.[652]

4. System Reliability Post-Merger

510. KCPL's approach to managing system reliability incorporates both tactical day-to-day operational processes, as well as a comprehensive portfolio of proactive Asset Management Programs.[653]

511. KCPL has reviewed its and Aquila's management structures, work practices, technology use and most importantly the use of the field workforce to ensure it can reach and maintain its Tier I system performance objectives.[654]

512. KCPL captures and tracks outage information at a more detailed customer and circuit level and will migrate Aquila facilities into KCPL's Outage Management System ("OMS"). This expanded OMS will provide the capabilities for system monitoring, event management and capture at circuit component and customer levels so that targeted reliability improvements can be determined and addressed as needed.[655]

513. The system performance data KCPL can obtain through the OMS application is also used to continually measure the effectiveness of long-term asset management programs.[656]

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[650] *Id*.
[651] *Id*.
[652] *Id*. KCPL has applied the same criteria in Missouri and Kansas. *Id*.
[653] *Id*.
[654] *Id*.
[655] *Id*.
[656] *Id*.

514. In addition to the expanded OMS application, KCPL will expand its Outage Reporting System ("ORS") so that its management team can monitor outage performance of both territories from open web based applications.[657]

515. The OMS and ORS applications and work practices will be expanded to cover the entire customer base.[658]

516. The Aquila territory has operated with extended workday hours but will benefit from KCPL's model for 24/7 shift work in field operations in the Kansas City metropolitan area. Both companies have reviewed the historical outage levels and locations in order to place the expanded 24/7 shift workers in strategic response locations in the combined territory and at the appropriate levels. KCPL will also expand its automated crew callout system in the Aquila territory.[659]

517. Regarding KCPL's Asset Management Programs, KCPL is currently performing a Distribution System Inventory and Condition Assessment ("DSICA") that will be used to assess asset health. Applications, processes, and tools that have been developed for the DSICA will be adapted for assessing the health of Aquila's distribution system. Data analysis, trending, optimization studies, specific equipment history, and health assessment tools developed at KCPL can be used across both systems rather than being developed separately.[660]

518. After completion of the DSICA, programs can be refined across both companies for better investment optimization. The combined companies portfolio will include: High Outage Count Customers; Circuit Inspection and Repair; URD Cable Replacement; URD Cable Injection; Worst Performing Circuits; Infrared Patrols; and various Distribution Automation initiatives.[661]

519. Expansion of Distribution Automation at Aquila will instantaneously provide critical information to system operators during outages or other events. KCPL's extended use of distribution automation on the Aquila network will enable real time, condition-based monitoring and maintenance of certain assets, rather than mere cyclic

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[657] *Id*. The ORS system has been in place at KCPL since 2004 and is considered an extremely useful management tool to make early tactical decisions supporting recovery from major events or storms. *Id*.
[658] *Id*.
[659] *Id*.
[660] *Id*.
[661] *Id*.

patrols. This information can then be shared with customer service personnel and customers.[662]

520. Overall, the expertise from both companies will be consolidated, enabling sharing of knowledge and experience and providing additional resource depth. The knowledge and experience base of the combined companies will be greater than that of either stand-alone.[663]

5. Strategy and Approach for Combining the Customer Service Functions

521. KCPL's organization design will be adopted for both companies to minimize change as much as possible. Using a known design, and mapping Aquila's customer service activities to it, reduces the number of variables requiring change. This approach will provide a smoother transition, and position the implementation of improvement projects once the sale is complete.[664]

522. The organization structure is designed around core service processes, which will allow KCPL to effectively monitor performance and compare to historical achievement levels. Careful review of each detailed customer service process is also underway, including the identification of best practices at each company so that areas of strong performance are maintained.[665]

523. To begin the mapping process between organizations, teams were formed using subject matter experts from each company based on the current KCPL functional areas of customer service as the baseline. The focus of the assessment was to ensure that all work was accounted for at Aquila, and properly mapped into the KCPL organization even if there are some alignment differences organizationally.[666]

524. In total, 124 incremental positions will be added to KCPL's Customer Service team at the successful completion of the merger. This number is the sum of the allocation from Aquila's Central

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[662] *Id*. Many of the noted KCPL Asset Management and Distribution Automation Programs are identified in KCPL's Comprehensive Energy Plan as part of the company's stated commitments to continually improve transmission and distribution infrastructure. *Id.*

[663] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22.

[664] *Id*.

[665] *Id*.

[666] *Id*. An example would be the meter reading function, which is part of the customer service team at KCPL, but not at Aquila. In this case, the monitoring of meter reading completion and accuracy rates will still be tracked, but it will be part of a different department. *Id*.

Service team to its Missouri electric properties plus the direct cost areas of meter reading, customer service personnel, and the customer relations team.[667]

525. There are differences in how functions are aligned between the two companies, but the balanced approach of comparing the staffing in the Aquila allocated model to the integration planning teams' bottom up staffing requirements shows that adequate staffing will be in place to sustain current service levels to customers.[668]

526. Because KCPL expects additional customer questions for the first year following the transition date, an additional forty-two employees will be retained in the Customer Service area to work through the temporary influx of requests and ensure that customer service stays at its current levels. KCPL will use the normal attrition process to achieve expected staffing levels, but will let service levels guide that decision.[669]

527. Customer service operations will be consolidated into the Raytown location with the exception of the consolidated Field Services group, which will remain at the 1331 facility. [670]

528. Each integration planning team initiated a full review of system, process, business rule, and regulatory differences between the two companies in preparation for the actual integration. Once the reviews are complete, KCPL will be able to finalize the actual implementation approach to achieve the best possible outcome during the transition.[671]

6. Maintenance of Recent Improvements in Aquila's Customer Service

529. KCPL has established teams represented by both companies to review all customer service work processes and document the customer requirements and strategies used to achieve targeted performance. Using this approach, KCPL will understand what improvements have been made in Aquila's customer service enabling it to ensure those activities will be continued, and well aligned with customer expectations.[672]

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[667] *Id*.
[668] *Id*.
[669] *Id*.; Transcript, p. 2295;
[670] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22.
[671] *Id*.
[672] *Id*.

530. Part of the organizational design will include the adoption of a formalized Quality Assurance and Training team. This best practice will allow KCPL to continuously measure and improve the performance of its customer service teams in the Care Center. This information will be combined with "Voice of the Customer" (feedback surveys) data to make sure KCPL is focused on those things that make it easier for customers to do business with KCPL, as well as fully leveraging technology such as Interactive Voice Response and Virtual Hold providing convenience to customers.[673]

531. Customer satisfaction is measured by the J.D. Power survey, and going forward, the combined companies will use the J.D. Power customer survey process.[674]

532. KCPL utilizes the performance trends for supporting metrics that have a large effect on customers. Its goal for Tier 1 performance, *i.e.*, top quartile, in its key metrics is supplemented and validated by improvements in performance measured through these supporting metrics. The metrics identified for Customer Services are the Care Center service levels, billing accuracy, meter reading accuracy, and Commission complaints.[675]

533. KCPL was recently ranked in the top quartile according to the residential electric survey results as reported by J.D. Power in the Midwest category.

534. KCPL recommends reviews of Customer Service performance at regular intervals with the Commission's Staff as the mechanism for Commission assurance that service will continue at current levels.[676]

7. Customer Service Operations

535. KCPL's current **customer service operations** consist of the following departments: (1) the Call Center;[677] (2) Billing Services;

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[673] *Id*.
[674] *Id*.
[675] *Id*. Specifically, customer service metrics, including the history of both KCPL and Aquila, for 2004 through June 2007, are depicted in the chart at page 21.
[676] GPE/KCPL Exh. 17, Herdegen Supp. Direct, pp. 2-22.
[677] During the hearing, Mr. Marshall explained the difference between a "call center" and a "service center" during the hearing: "A call center is primarily where we have our customer service representatives that answer phones, handle a broad range of needs from our customers, so they talk with customers directly. Or we have technology that the customer can call in and get information through our voice response systems or other online technologies that give them whatever information or whatever transactions they would like to do with us. A service center is primarily oriented around craft, primarily linemen and metermen and people that are necessary to keep the distribution transmission

(3) Credit and Collection; (4) Customer Relations (5) Meter Reading/Field Service; and (6) Revenue Protection.[678]

536. KCPL has a single **call center** and Aquila currently utilizes two call centers to address the electric and gas systems. A single call center for the new Great Plains customer base will be created. The call center, referred to as the Customer Care Center, will handle all residential and business customer contacts for time-saving, self-service options for any service or account need including service requests, new construction or service upgrades, billing and account information, payment options, and special programs and services. In addition, KCPL will evaluate the call center approaches it currently has in place and determine any changes that are necessary following the merger.[679]

537. **Billing Services** ensures the accurate and timely billing of retail customers – major functions include account adjustments, entering rate changes, set-up of area light billings, processing customer refunds, adding and removing customers on Easy Pay program and resolution of various issues within our computer systems. KCPL will evaluate the approaches each company is taking to payment options, to the delivery and printing of bills, and to the information flow from its meter systems with the intent of creating one approach to the bill process that customers will understand, regardless of geographic location.[680]

538. **Credit and Collection** handles the collection of past due receivables. KCPL will review the current work force approach taken at both companies, and evaluate the outbound telephone calling technology currently utilized. KCPL will also review third party approaches taken in the industry to establish a single approach to this business area.[681]

539. The **Customer Relations Department** is responsible for the investigation and response to informal commission complaints and inquires, it builds profiles on community action and social service agencies to strengthen relationships, it identifies low-income, elderly and disabled customers for purposes of outreach and customer service that is targeted to their needs, and it takes a forward-looking approach with medical and hospice customers, as well as nursing homes, by staying in

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infrastructure service, so they're more focused on the wires and the outside aspect of the plant. Transcript, p. 2219.

[678] GPE/KCPL Exh. 16, Herdegen Direct, pp. 8-12.

[679] *Id*.

[680] *Id*.

[681] *Id*.

touch with them during extended heat periods and extended outages. The department will be reviewed in consideration of the added customer base and service territory.[682]

540. The **Meter Reading/Field Service Department** ensures the accurate and timely reads of electric meters for billing. The initial review of integration for these areas will include meter reading integration, mobile implementation and labor issues. KCPL currently utilizes an Automated Meter Reading ("AMR") system and Great Plains will review expansion of metering technology to the acquired geographic areas, including the investigation of Advanced Metering Infrastructure solutions for the integrated company, reviewing interface capabilities with the current meter reading and the customer information systems.[683]

541. If the Commission approves the merger, KCPL plans to expand its AMR into Aquila's urban areas.[684] There is a significant amount of capital involved in the AMR project;[685] however, expected synergy savings for the project in terms of labor and other savings are approximately $4.7 million.[686] The AMR project will also bring about improvements in service quality since AMR will allow enhanced meter reading capabilities and increase the level of program offerings to customers.[687]

542. AMR allows quicker response times for the customer, reduced fuel/energy costs, and increased productivity due to reduced drive times. Using AMR will allow Aquila to employ Advanced Metering Infrastructure which enables the utility to obtain connect/disconnect reads without a field visit; detect tampering, theft and diversion of service; obtain real-time leads to resolve billing complaints over the phone; provide outage management; and verify when power has been restored. These improvements in service quality to Aquila customers will take place as a result of KCPL's expertise in implementing AMR systems and its ability to invest in AMR technology.[688]

543. Another area involving the field service department is vegetation management. The companies plan to reduce the amount of spending on tree trimming by Aquila; however, adopting KCPL's

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[682] *Id*.
[683] GPE/KCPL Exh. 16, Herdegen Direct, pp. 8-12.
[684] Transcript, p. 2281.
[685] Transcript, p. 2282.
[686] Transcript, p. 2289.
[687] GPE/KCPL Exh. 16, Herdegen Direct, p. 11; GPE/KCPL Exh. 17, Herdegen Supp. Direct, p 6.
[688] GPE/KCPL Exh. 17, Herdegen Supp. Direct, p 6.

vegetation management practices improves the reliability of the circuit, instead of encouraging contractors to trim trees, whether or not it is needed.[689]

544. **Revenue Protection** minimizes the companies' loss of revenue due to fraud, theft of service, or other metering irregularities by identifying and investigating abnormal account activity. Great Plains and KCPL will continue to focus on meter data management solutions to provide early warning of abnormal conditions that enable transition to a proactive revenue assurance approach within the companies.[690]

545. Overall, customer service operations at both KCPL and Aquila are expected to reach Tier 1 following the merger.[691]

546. Immediately following the merger, Great Plains and Black Hills will operate as stand-alone companies; however, in order to provide a seamless integration of customer service functions to customers, there may be a short transition period where Great Plains Energy provides assistance to Black Hills Corporation.[692]

8. Current Services Provided and Post-Merger Integration

547. KCPL offers a variety of products and services for commercial, industrial, and residential customers.[693]

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[689] Transcript, p. 2287-2288. Witness Herdegen testified that by using KCPL's experience and best work practices, Aquila's incremental spending on tree trimming can be reduced by about 30 percent or approximately $2 million per year. *Id*.

[690] GPE/KCPL Exh. 16, Herdegen Direct, pp. 8-12.

[691] *Id*.

[692] *Id*.

[693] GPE/KCPL Exh. 4, **Bryant Direct**, pp. 3-12. These products and services include: (1) For Commercial & Industrial customers KCPL offers: E-Services and Payment Options: AccountLink, ApartmentLink, Check By Phone, Easy Pay, Web Pay, Paperless, Real-Time Pricing, Dusk to Dawn Security Lighting; (2) For Residential Consumers, KCPL offers: E-Services and Payment Options AccountLink, Easy Pay, Web Pay, Check By Phone, Paperless, Pay Stations, Delayed Due Date; and, (3) Other Programs & Services: Dollar-Aide, Dusk to Dawn Security Lighting, and Medical Customer. *Id.*

Kevin E. Bryant is employed by KCPL as Vice President of Energy Solutions. His responsibilities include providing leadership and direction to the Energy Solutions team, including the development, coordination and execution of promotional strategies and programs designed to efficiently and effectively promote and implement KCPL's products and services. He is also responsible for all residential and commercial sales efforts and for maintaining relationships with KCPL's largest customers and trade allies. His duties include initiating and bringing to market new products and services, as well as improvements and innovations to existing products and services. His duties also include the development, implementation and evaluation of customer programs, which include demand side affordability, energy efficiency, and demand response programs. His role

548. KCPL intends to evaluate the totality of services provided by it and Aquila and develop a combined portfolio of products and services for the combined customer, including developing a plan to ensure the seamless integration of the products and services addressing any requirements in all areas including marketing, product development, planning, and information systems.[694]

549. KCPL is in the process of evaluating or implementing two Affordability programs, ten Energy Efficiency programs, two Demand Response programs, and two additional funding areas to be extended to Aquila's customers.[695]

550. KCPL has evaluated the customer programs it offers and the programs that Aquila either offers or has proposed to offer as part of its Integrated Resource Plan that was submitted to the Commission in February 2007. Although Aquila currently offers a limited portfolio of affordability, energy efficiency, and demand response programs, Aquila has proposed to offer its customers a more robust portfolio of affordability, energy efficiency, and demand response programs. KCPL

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also includes the recent assignment as leader of the Energy Solutions Integration team, which is responsible for the integration of Aquila with KCPL's Energy Solutions team. He pursued an undergraduate education from the University of Missouri – Columbia where he graduated Cum Laude with dual degrees in both finance and real estate in May 1997. He continued his education at the Stanford University Graduate School of Business where he graduated with a Masters in Business Administration degree, with an emphasis in finance and marketing, in June 2002. He joined Great Plains in 2003 as a Senior Financial Analyst and was promoted to Manager - Corporate Finance, in 2005 where he was responsible for contributing to the development and maintenance of the sound financial health of both Great Plains and KCPL through the management of company financing activities. He has experience in strategic planning and financial areas including analysis, cash management, financial modeling and mergers and acquisitions. While at THQ Inc. from 2002 to 2003, a worldwide developer and publisher of interactive entertainment software based in Calabasas, California, he served as Manager - Strategic Planning where he was, amongst other things, responsible for establishing corporate goals and developing and assisting with the execution of the Company's strategic plan. As a Corporate Finance Analyst from 1998 to 2000 for what is now UBS Paine Webber, he worked on mergers and acquisitions for medium and large sized companies. He also worked at Hallmark Cards as a Financial Analyst from 1997 to 1998.

[694] GPE/KCPL Exh. 4, Bryant Direct pp. 3-12.

[695] GPE/KCPL Exh. 4, Bryant Direct pp. 3-12. Those programs include: Affordable New Homes (New Construction), Low Income Weatherization Program, Home Energy Analyzer, The Home Energy Analyzer, Home Performance With Energy Star® (Training), Change a Light, Change the World, Cool Homes Program, Energy Star® Homes (New Construction), PAYS-type program, Business Energy Analyzer, C&I Audit Rebate, C&I Custom Rebates-Retrofit, and C&I Custom Rebates-New Construction, Building Operator Certification (Training), Energy Optimizer (Air Conditioning Cycling), and MPower. *Id.*

began its assessment of these programs by mapping each company's respective product and service offerings in one of the following program category types: (1) Affordability; (2) Energy Efficiency; (3) Demand Response & Pricing Options; (4) E-Services & Payment Options; and (5) Other.[696]

551. The purpose of this mapping, outlined in the preceding Finding of Fact, was to identify areas where: (1) both companies provide a product offering or has proposed to provide a product offering; (2) either KCPL or Aquila provides a product offering or has proposed to provide a product offering; or (3) a gap exists where neither company currently provides or has proposed to provide a needed product offering. Post acquisition, KCPL anticipates offering a total of 37 programs.[697]

552. Of the 28 current KCPL programs, KCPL expects to offer 21 of those programs to Aquila's customers. Many of these programs require a filed tariff before they could be offered to Aquila's customers. These programs are: (1) Affordable New Homes; (2) Low Income Weatherization; (3) Home Energy Analyzer; (4) Home Performance with Energy Star®; (5) Change A Light/Change The World; (6) Cool Homes; (7) Energy Star Homes; (8) Business Energy Analyzer; (9) C&I Rebates; (10) Building Operator Certification; (11) Energy Optimizer; (12) MPower; (13) AccountLink; (14) AccountLink Advantage; (15) ApartmentLink; (16) Web Pay; (17) Check By Phone; (18) Web Approve; (19) Paperless Bill; (20) Dollar Aide; and (21) Dusk To Dawn Security Lighting.[698]

553. KCPL continues to evaluate the remaining seven currently-offered KCPL programs. These programs represent offerings where both KCPL and Aquila have a program offering (or propose to have a program offering) and it is anticipated that a single offering will be provided. The evaluation on the combination of these programs has not been completed. These programs are: (1) Real-Time Pricing; (2) Two-Part Time of Use; (3) BuilderLink/Builder Web Site; (4) Easy Pay/CheckLine; (5) Budget Billing/StreamLINE; (6) Green Tariff; and (7) Net Metering.[699]

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[696] *Id*.; GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.
[697] GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules. A summary of KCPL's assessment is provided in Schedule KEB-1. Brief program descriptions for each of these customer programs are provided in Schedule KEB-2. Currently, KCPL offers or plans to offer 28 programs. Aquila offers or plans to offer 26 programs.
[698] GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules. See summary in Schedule KEB-1,
[699] *Id*.

554. Of the 27 customer programs offered or proposed to be offered by Aquila, KCPL continues to evaluate eight of them. These eight current or proposed programs are: (1) Low Income Energy Education; (2) Residential New Construction; (3) Thermal Envelope Improvements; (4) Residential Audit; (5) School Based Energy Education; (6) Demand Buyback; (7) Fixed Bill; and (8) PowerTech Heat Pump Financing.[700]

555. Based upon KCPL's assessment to date, the eight programs outlined in the preceding Finding of Fact remain candidates for inclusion in the combined program portfolio. KCPL plans to move forward with offering Aquila's Agency Portal program to KCPL customers. This program is currently available and offers Aquila customers a web portal for social service agencies.[701]

556. KCPL plans to offer all of its Affordability, Energy Efficiency and Demand Response programs to Aquila customers. To support this effort, KCPL proposes to invest $5.0 million, $12.5 million, $12.5 million, $15.0 million, and $15.0 million in the years 2008-2012, respectively, for a total five-year investment of $60 million for Aquila customers.[702]

557. KCPL has committed to maximizing cost-effective demand-side solutions as part of future generation capacity planning. Since 2005, KCPL has been aggressively developing and promoting the Affordability, Energy Efficiency, and Demand Response programs that are part of its CEP. These activities have increased KCPL's understanding of customers' needs and preferences while refining KCPL's program development process along the way. By leveraging these growing capabilities and knowledge within Aquila's service territory, KCPL can create additional opportunities for energy efficiency and demand-side resources.[703]

558. KCPL has proposed an investment of $60 million over the 2008-2012 timeframe for sizing an Affordability, Energy Efficiency, and Demand Response portfolio because KCPL's CEP contemplated nearly $53 million of investments in such programs over the first five years of program existence and KCPL, given its recent experience with its CEP programs, this base level of investment is required to facilitate

[700] *Id.*
[701] *Id.*
[702] GPE/KCPL Exh. 4, Bryant Direct pp. 3-12; GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.
[703] GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.

the launch of a successful and robust portfolio of programs for Aquila's customers.[704]

559. Significant and cost-effective energy efficiency opportunities exist in the areas of both commercial and residential lighting and both commercial and residential heating, ventilation, and air conditioning. Consequently, KCPL has increased the level of proposed investment to $60 million to allow for resources to more heavily target these energy efficiency opportunities.[705]

560. KCPL has also proposed this increased level of investment to allow for a set of energy efficiency and demand response programs that would be structured to leverage its proposed Advanced Meter Infrastructure investments. These programs would take advantage of the two-way communication ability afforded by its investment in Advanced Meter Infrastructure and would lead to incremental energy efficiency and demand response resources within Aquila's service territory.[706]

561. KCPL continues to develop a customer marketing segmentation approach to facilitate adoption of its programs and will use this same marketing approach for Aquila's customers.[707]

562. The benefits of energy efficiency, as articulated in the National Action Plan for Energy Efficiency, and as promoted by KCPL, are significant. These benefits include: (1) Lower energy bills, greater customer control and greater customer satisfaction; (2) lower cost than supplying new generation only from new power plants; (3) modular and quick to deploy; (4) significant energy savings; (5) environmental benefits; (6) economic development; and (7) energy security.[708]

563. KCPL recommends that its Customer Program Advisory Group ("CPAG") expand its oversight to include offerings to Aquila's customers. CPAG was established specifically as a result of the Stipulation and Agreement in Case No. EO-2005-0329.[709]

564. KCPL will perform a benefit-cost analysis on all proposed Aquila programs. Aquila's rates for service are different than KCPL and will need to be analyzed separately.[710]

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[704] GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.
[705] *Id*.
[706] *Id*.
[707] *Id*.
[708] GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.
[709] *Id*.
[710] GPE/KCPL Exh. 4, Bryant Direct pp. 3-12; GPE/KCPL Exh. 5, Bryant Supp. Direct, pp. 1-9 and accompanying schedules.

565. At this time, KCPL does not have a specific estimate of the expected costs of expanding KCPL's and Aquila's customer programs into each other's service territory; however, it has demonstrated its commitment through its proposed investment expansion of $60 million for affordability, energy efficiency, and demand response programs to Aquila's customers.[711]

9. Other Post Merger Considerations

a. Energy Efficiency and Conservation Issues

566. Great Plains plans to evaluate Aquila's energy efficiency, conservation, and other related programs. KCPL will continue its current programs, and Great Plains will evaluate extending those programs to Aquila's customers. Great Plains Energy will also explore expanding any successful Aquila programs to KCPL's customers.[712]

b. Transition Services

567. Following the merger and Black Hills' acquisition of Aquila's non-Missouri assets, Great Plains, or one if its subsidiaries, might need to provide services to Black Hills, or *vice versa*, on a temporary basis. Such services might include, among other things, customer support, information technology, and accounting services.[713]

568. In recognition of the potential need to provide temporary services, the parties entered into a Transition Service Agreement ("TSA").[714] Under the TSA, the parties have composed a transition service committee to examine these transition service issues, and the parties agreed to finalize a transition service plan setting forth the steps to be taken by each party in order to resolve the transition service issues by July 30, 2007.[715]

569. On August 2, 2007, the Applicants filed a TSA and Amendment 1 to the TSA, including a Schedule of Services to be provided between the Applicants and Black Hills. The TSA was executed on February 6, 2007, and Amendment 1 was executed on July 30, 2007.[716]

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[711] *Id*.
[712] GPE/KCPL Exh.20, Marshall Direct pp. 8-10.
[713] GPE/KCPL Exh.20, Marshall Direct pp. 8-10.
[714] *Id*.
[715] *Id*.
[716] GPE/KCPL Exh.20, Marshall Direct pp. 8-10; GPE/KCPL Exh. 33, Transition Services Agreement.

c. Communities

570. Currently Great Plains and KCPL support initiatives targeted toward: (1) improving the lives of vulnerable youth; (2) environmental programs that build on current business practices, including energy efficiency/weatherization, tree care, and plantings and conservation; and (3) agencies and initiatives focused on retaining and stimulating economic and community development, as well as utility-related workforce development.[717]

571. This community strategy is supported by financial contributions, as well as a volunteerism program allowing employees to participate with partner agencies through a combination of personal and company time.[718]

572. Great Plains Energy and KCPL plan to review Aquila's current community support activities and will assess the effectiveness of those activities. Great Plains and KCPL will continue those programs that align with its focus areas and philosophy of community improvement and offer the best value and effectiveness for the communities served.[719]

10. Controverting Evidence

573. In the Staff Report, adopted and proffered by Mr. Schallenberg, Mr. Schallenberg expresses some generalized concerns regarding service quality; however, Staff provides no evidence that service quality would in any way be compromised if the merger is approved by the Commission.[720] Moreover, as Mr. Schallenberg testified, he is not an expert in service quality.[721] The parties waived cross-examination of Mr. Schallenberg on the issue of service quality.[722]

574. No other party adduced any credible evidence that if the Commission approves the merger, Aquila's and KCPL's service quality would be adversely affected.

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[717] GPE/KCPL Exh.20, Marshall Direct pp. 8-10.
[718] *Id*.
[719] GPE/KCPL Exh.20, Marshall Direct pp. 8-10.
[720] Staff Exh. 100, Attached Report, pp. 68-77.
[721] See Witness Credibility Findings, specifically Findings of Fact Numbers 70-93 and 99-100.
[722] Transcript, pp. 2314-2315.

I. Findings of Fact Regarding the Requested Waiver of the Commission's Affiliate Transactions Rule, 4 CSR 240-20.015

1. Post-Merger Accounting

a. Post-Merger Affiliate Transactions

575. If the Commission approves the proposed merger, KCPL and Aquila will each be separate affiliates of Great Plains. Although Aquila and KCPL will remain separate legal entities, many of the companies' operational functions will be integrated after the merger closes.[723]

576. If the Commission approves the merger, the Applicants intend to account for Aquila's operations in Great Plains' accounting and reporting systems with a separate general ledger similar to Aquila's general ledger today, with reporting entities within its accounting and reporting systems for Aquila's regulatory business units (currently named Aquila Networks-MPS, Aquila Networks-L&P, and St. Joseph Industrial Steam) and for those business units' parent company (currently named Aquila, Inc.).[724]

577. The current allocation methodology used by Great Plains Energy Services, Inc. ("GPES") to allocate shared costs to KCPL and other Great Plains business units, as documented in the Great Plains Cost Accounting Manual filed annually with the Commission, will be utilized to charge Aquila's business units for costs incurred by KCPL, GPES or Great Plains that benefit multiple subsidiaries, commonly referred to as shared or common costs.[725]

578. Aquila's employees will become KCPL employees and services will be provided to Aquila from KCPL, GPES and Great Plains.[726]

579. Shared costs, or common costs incurred by KCPL, GPES or Great Plains that benefit multiple subsidiaries will be incurred by KCPL, such as accounting, payroll, regulatory, and accounts payable, whereas other shared costs will be incurred by GPES, such as human resources.[727]

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[723] GPE/KCPL Exh. 39, Giles Supp. Direct, p. 1.
[724] GPE/KCPL Exh. 29, Wright Direct, pp. 6-8.
[725] *Id.* at pp. 7-8.
[726] GPE/KCPL Exh. 29, Wright Direct, p. 7.
[727] *Id*. at pp. 7-8.

580. GPES's allocation of its shared costs will be expanded to include Aquila in the allocation, and similar KCPL allocations will be established for KCPL's allocation of its shared costs.[728]

581. If it is determined that a particular KCPL shared cost should be allocated based on each business unit's utility plant, then Aquila will receive a portion of that cost based on its utility plant.[729]

582. Aquila's existing allocation methodologies to allocate costs among the various Aquila business units will be used to allocate individual Aquila business units that are shared costs allocated to Aquila.[730]

583. The allocation methods outlined in the previous Findings of Fact involve the billing of costs to an affiliate company. Consequently, if the Commission decides to approve the merger, the Applicants request that the Commission waive its affiliate transaction rule, Commission Rule 4 CSR 240-20.015, as it pertains to transactions between Aquila and KCPL to the extent the Commission deems necessary.[731]

b. Tax Consequences

584. The income tax consequences to Aquila's customers are minimal. The merger will be treated for federal income tax purposes as a taxable stock purchase.[732]

585. The shareholders of Aquila will recognize a gain or a loss on their shares of stock; however, Aquila will not recognize any gain or loss on the sale of its stock and therefore Aquila's tax basis in Aquila's remaining assets after the merger will be the same as Aquila's tax basis prior to the merger.[733]

586. Aquila's existing unamortized investment tax credits and deferred income tax reserves will carry over to Aquila post-merger.[734] There will be no changes to these components because the merger is a stock transaction and not a sale of assets.[735]

587. The merger will not affect the property taxes of Great Plains. Utility property taxes are based upon the fair market value of the

[728] *Id*.
[729] *Id*.
[730] *Id*.
[731] GPE/KCPL Exh. 29, Wright Direct, pp. 7-8. See also Joint Application of Great Plains Energy Incorporated, Kansas City Power and Light Company and Aquila, Inc., filed April 4, 2007.
[732] GPE/KCPL Exh. 29, Wright Direct, p. 8.
[733] *Id*.
[734] *Id*.
[735] *Id*. at p. 9.

utility. The fair market value of Aquila and Great Plains combined should not be significantly different than the combined values of the companies standing alone, and therefore the assessed valuation should not change appreciably.[736]

2. Purpose of the Affiliate Transactions Rule

588. The stated "purpose" of the Affiliate Transactions Rule (4 CSR 240-20.015) is "to prevent regulated utilities from subsidizing their non-regulated operations."[737]

589. The affiliate transaction rule is premised on asymmetric pricing to prevent a public utility from subsidizing its affiliates.[738]

590. Pursuant to the affiliate transaction rules, goods and services provided by a public utility to *any* affiliate are to be priced at the higher of market value or the cost to the public utility in providing the goods and services.[739]

591. Conversely, goods and services provided by *any* affiliate to a public utility are to be priced at the lower of market value or the cost to the public utility in providing the goods and services to itself.[740]

592. The pricing mechanism in the affiliate transaction rule is designed to make the public utility indifferent as to whether it sells or receives goods and services from an affiliate or a third party.[741]

593. This concept is appropriate where the transactions involve a public utility and an unregulated affiliate.[742]

594. If both parties are public utilities subject to the affiliate transaction rule, the rationale underlying the rules does not apply because the utilities already are subject to Commission regulation. In such a utility-to-utility situation, the asymmetric pricing mechanism is also unworkable. If a public utility is to provide a service to an affiliated public utility, the public utilities are on the opposite sides of the asymmetric pricing requirements.[743]

595. The affiliate transaction rule does not contemplate two regulated utilities owned by the same parent and operated in the manner contemplated by the merger.[744]

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[736] *Id*. at p. 9.
[737] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 3-4.
[738] GPE/KCPL Exh. 15, Giles Surrebuttal, pp. 7-8.
[739] *Id*.
[740] *Id*.
[741] *Id*.
[742] *Id*.
[743] GPE/KCPL Exh. 15, Giles Surrebuttal, pp. 7-8; Transcript, pp. 2064-2066.
[744] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 3-4.

596. Rather than the asymmetrical pricing prescribed in the rule, the Applicants request that the Commission grant a waiver from the rules to the extent necessary to allow KCPL and Aquila to provide services at fully distributed costs, except for wholesale power transactions, which would be based on rates approved by FERC.[745]

3. Effect of Application of the Rule to Synergies Generated by the Merger

597. The synergies contemplated by Great Plains Energy in this transaction are premised on the ability of KCPL and Aquila to exchange goods and services at cost. To the extent the asymmetric pricing dictated by the affiliate transaction rules prevents KCPL and Aquila from doing so, the synergies will be reduced to the detriment of the utilities' Missouri customers.[746]

598. Applicants' request for a waiver from the affiliate transactions rule as it might pertain to KCPL and Aquila, if granted, will help the companies achieve synergy savings.[747]

599. Because KCPL and Aquila will each be "regulated electrical corporations" and "public utilities" under Chapter 386, and thus subject to the Commission's jurisdiction, both companies will continue to be subject to the various reporting requirements they operate under today and the Commission will continue to have access to the books and records of both companies.[748]

4. Staff's Position – Controverting Evidence to the Requested Waiver

600. Staff argues that the waiver of the rule should not be granted because the merger or consolidation of KCPL and Aquila is outside the scope of the proposed transaction in this case, and because Staff believes that they do not have sufficient information to evaluate the requested waiver.[749]

601. Under cross-examination, Staff witness Schallenberg agreed that the purpose of the affiliate transactions rule is to prevent regulated utilities from subsidizing their non-regulated operations and that after the close of the merger, if approved, the Commission will have full access to the books and records of both Aquila and KCPL.[750]

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[745] *Id.*
[746] GPE/KCPL Exh. 15, Giles Surrebuttal, pp. 7-8.
[747] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 3-4.
[748] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 2.
[749] Staff Exh. 100, Schallenberg Direct, attached Report, pp. 64-68.
[750] Transcript, pp. 2070-2071.

Mr. Schallenberg also indicated that Staff was not generally opposed to transactions between Aquila and KCPL on a cost basis.[751]

602. There is no competent or credible evidence in the record that, if the proposed merger is approved, a limited waiver or grant of a variance in the Commission's affiliate transactions rule allowing KCPL and Aquila to provide services at fully distributed costs, except for wholesale power transactions, would in any way cause a detriment to the public interest.

J. Findings of Fact Regarding Transmission and RTO/ISO Criteria

1. Regional Transmission Organization Participation, Pre- and Post-Merger Considerations

603. Regional Transmission Organizations ("RTOs") were promoted and established, among other reasons, in order to provide benefits and improvements in electric transmission services and in the operation of the bulk power system. These benefits include open and non-discriminatory electric transmission access and pricing, regional Open Access Transmission Tariff ("OATT") administration, regional transmission planning and coordinated regional reliability operations.[752]

604. If the Commission approves the merger, KCPL employees will operate the transmission systems of KCPL and Aquila following the merger.[753]

605. Regarding the effect of the merger on the transmission operations of KCPL and Aquila and their RTO participation, KCPL proposes to take the following actions: (1) consolidate transmission control center operations; (2) integrate Aquila's planning functions with KCPL's planning functions; (3) incorporate Aquila's transmission and substation field operations into KCPL's operations; (4) combine the transmission and substation engineering processes; and (5) include the Aquila facilities in the KCPL comprehensive transmission asset management plan in order to achieve Tier I reliability levels for all customers.[754]

606. Aquila is currently a conditional member of the Midwest Independent Transmission System Operator ("MISO") RTO, whereby

[751] Transcript, p. 2071.
[752] GPE/KCPL Exh. 20, Marshall Direct, p. 7.
[753] *Id*. at pp. 6-7.
[754] *Id*.

MISO provides specific transmission security and reliability coordination functions for Aquila.[755]

607. The Southwest Power Pool ("SPP") provides Aquila regional transmission tariff administration, available transmission capacity ("ATC"), total transmission capacity, and other regional planning functions.[756]

608. Aquila has an application pending before the Commission in Case No. EO-2008-0046, requesting authority to transfer functional control of its transmission facilities to MISO ("Aquila MISO Proceeding").[757]

609. The overview of the Aquila transmission system serving Missouri load is as follows: [758]

> 12. Aquila owns and operates transmission facilities in the northwestern, north central and western areas of Missouri serving approximately 300,000 electric customers in Missouri. Within its transmission system,

[755] GPE/KCPL Exh.20, Marshall Direct, pp. 8-10; GPE/KCPL Exh. 25, **Spring Surrebuttal**, pp. 1-9.
Richard A. Spring is employed by KCPL as Vice President of Transmission Services. His responsibilities include overseeing KCPL's transmission planning, transmission system operations, transmission energy accounting, Energy Management System, distribution OMS, substation and transmission engineering, transmission construction and maintenance, substation construction and maintenance, and system protection. He holds a Master of Business Administration from Rockhurst College, a Bachelor of Science in Mechanical Engineering from Wichita State University and an Associates of Arts degree from Butler County Community College. He began his career at KCPL in 1978 as a Staff Maintenance Engineer, promoted to Operations Supervisor in 1979 and Maintenance Superintendent 1982, all at the La Cygne Generating Station. He then moved to the Iatan Generating Station as Maintenance Superintendent where he was promoted to Plant Manager in 1984. He returned to the La Cygne Generating Station in 1991 as Plant Manager. In 1993, he joined Northern Indiana Public Service Company as Director of Electric Production. He returned to KCPL in 1994 as Vice President of Production. He shifted responsibilities and was named Vice President of Transmission and Environmental Services in 1999. In 2003, he was named to his current position of Vice President of Transmission Services. He is currently the Chair of the SPP Strategic Planning Committee, a member of the SPP Members Committee, and a member of the SPP Human Resources Committee. Previously, he served as a Director on the SPP Board of Directors prior to the evolution to the current independent Board of Directors. He has previously testified before both this Commission and the Kansas Corporation Commission.
[756] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[757] Id. See In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc., Case No. EO-2008-0046, Application filed August 20, 2007.
[758] GPE/KCPL Exh. 24, Spring Direct, pp. 3-11.

Aquila has direct interconnections with AmerenUE, Associated Electric Power Cooperative ("AEC"), the City of Independence ("IND"), Mid-American Energy Company ("MEC"), KCPL and Westar Energy Inc. ("WR"). Aquila operates two non-synchronous, normally open interconnections with Empire District Electric Company ("EDE") and KAMO Electric Cooperative ("KAMO"). Aquila has joint transmission ownership and interconnection agreements for the following facilities:

a) St. Joseph to Fairport, Missouri to Cooper Station at Brownville, Nebraska 345kV transmission line; known as the Cooper-Fairport-St. Joseph 345kV Interconnection ("CFSI"); and administered with a joint agreement between AEC, KCPL, Lincoln Electric System ("LES"), MEC, Nebraska Public Power District ("NPPD"), and Omaha Public Power District ("OPPD"). Aquila and OPPD jointly own the Cooper to St. Joseph 345kV transmission line with ownership changing at the point where the line crosses the Missouri river.

b) Aquila owns an 8 percent share of the Jeffrey Energy Center located in the WR territory. Transmission service is reserved, using a Jeffrey Transmission Agreement with WR, to deliver Aquila this capacity and energy via the Jeffrey (WR) to Stranger Creek line; and known as the Aquila-WR Interconnection.

c) Swissvale to Stilwell to Peculiar to Pleasant Hill to Sibley 345kV transmission line; known as the "MOKAN Interconnection"; and joint owners are KCPL, Aquila and WR.

d) Hawthorn to Sibley to Overton 345kV transmission line; known as the "Missouri Interconnection"; and joint owners are KCPL, Aquila and AmerenUE.

e) Aquila owns an 18 percent share of the Iatan Generating Station located near Weston, MO and has a 345kV transmission line directly connected at the station facilities for transfer of this capacity

> and energy. Aquila currently operates its transmission system from its Operations Center in Lee's Summit, Missouri using an [Energy Management System] with Supervisory Control and Data Acquisition ("SCADA"). The Operations Center is manned 24 hours per day providing both normal and emergency operations for transmission and substation facilities.[759]

610. KCPL is a full member of the SPP RTO.[760]

611. KCPL will evaluate the strategy of RTO membership when the acquisition is completed, taking into consideration multiple factors including the advantages of operating both transmission systems within a single RTO structure and the results of the pending cost-benefit study evaluating the relative benefits of Aquila's RTO options.[761]

612. The overview of the KCPL transmission system serving Missouri load is as follows:[762]

> 13. KCPL owns and operates transmission facilities in the west central and central areas of Missouri and east central areas of Kansas serving approximately 500,000 electric customers in Missouri and Kansas. Within its transmission system, KCPL has direct interconnections with AmerenUE, Aquila, AEC, Board of Public Utilities of Kansas City, Kansas ("BPU"), IND, and WR. KCPL has joint ownership in the following transmission facilities:
>
> a) The CFSI line, which is administered with a joint agreement with AEC, KCPL, LES, MEC, NPPD, and OPPD.
>
> b) The MOKAN Interconnection line, which is jointly owned by KCPL, Aquila and WR.
>
> c) The Missouri Interconnection line, which is jointly owned by KCPL, Aquila and AmerenUE.

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[759] *Id*. See also Schedule RAS-1 illustrating the Aquila 69kV transmission system; Schedule RAS-2 illustrating the Aquila 345kV and 161kV transmission system; Schedule RAS-3 illustrating the Aquila (St. Joseph area) transmission system; and, Schedule RAS-4 illustrating the entire Aquila transmission configuration with land-based geography.

[760] GPE/KCPL Exh.20, Marshall Direct, pp. 8-10; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9. KCPL's participation in the SPP has been approved by the Commission, the Kansas Corporation Commission, and FERC. GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[761] GPE/KCPL Exh.20, Marshall Direct, pp. 8-10.

[762] GPE/KCPL Exh. 24, Spring Direct, pp. 3-11.

> KCPL operates its transmission system from its Transmission Control Center in Kansas City, Missouri using an [Energy Management System] with SCADA. The Transmission Control Center is manned 24 hours per day providing both normal and emergency operations for transmission and substation facilities. Schedule RAS-5 illustrates the entire KCPL transmission system with land-based geography. Schedule RAS-6 illustrates the KCPL Kansas City metropolitan area transmission system with land-based geography.

613. The proposed plan for integrating Aquila's transmission operations after the merger is completed is as follows:[763]

> 14. a. Integrate Aquila's Operations Center into KCPL's Transmission Control Center.
>
> 15. b. Incorporate Aquila's transmission planning functions into KCPL's transmission planning functions.
>
> 16. c. Incorporate Aquila's transmission and substation field functions into KCPL's transmission and substation field functions.
>
> 17. d. Integrate Aquila's transmission and substation engineering functions into KCPL's transmission and substation engineering functions.
>
> 18. e. KCPL will incorporate all Aquila transmission assets into its comprehensive transmission asset management plan.

614. Combining the transmission operation should provide a more cost effective, integrated real-time and planned transmission operation of the combined transmission system. By operating from a single point of transmission system authority, KCPL can maintain consistent communication, coordinated field operations, and integrated training and manpower schedules.[764]

615. Merging planning functions should provide coordinated transmission planning over the combined service territories for improved synergies in system modeling capabilities, reductions in transmission facility additions, improved tie-line coordination with the region, and a larger, more regional system planning scope.[765]

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[763] GPE/KCPL Exh. 24, Spring Direct, pp. 3-11.
[764] *Id.*
[765] *Id*.

616. Incorporating transmission and substation field functions should provide synergies in field operating practices where specific operation and maintenance practices can be engaged. KCPL is a recognized leader in these practices and is in a position to apply specific industry best practices that will provide improvements in these critical operating areas.[766]

617. Combining transmission and substation engineering functions will utilize the collaborative engineering talent and provide standardized design and construction methods, which should result in increased savings in transmission and substation asset investments.[767]

618. The asset management plan sets forth strategic investments in new transmission and substation facilities while also providing crucial maintenance, inspection, testing, and replacement plans for aging infrastructure. KCPL provides Tier 1 service reliability levels to its customers and plans to maintain the same level of service for the Aquila customers.[768]

619. KCPL, as a member of SPP RTO, has turned over functional control of its transmission facilities to SPP as an RTO.[769]

620. KCPL currently serves its native load under the SPP OATT.[770]

621. Most service provided on KCPL's transmission system to parties other than KCPL is administered through the SPP OATT. The SPP OATT provides several benefits including one-stop pricing and reservations for transmission customers across the entire SPP region, nondiscriminatory transmission service, consistent terms and conditions of service, and equitable revenue recovery.[771]

622. KCPL continues to maintain a small number of grandfathered point-to-point transmission reservations under the KCPL OATT but the KCPL OATT is closed except for network service and rollover extensions of existing reservations.[772]

623. SPP acts as a regional Planning Coordinator and creates plans for future transmission grid additions through its annual

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[766] *Id*.
[767] *Id*.
[768] *Id*.
[769] *Id*.
[770] GPE/KCPL Exh. 24, Spring Direct, p. 8.
[771] *Id*.
[772] GPE/KCPL Exh. 24, Spring Direct, p. 8.

SPP Transmission Expansion Plan and four-month Aggregate Study process (together referred to as the "Plan").[773]

624. This Plan incorporates OATT transmission service requests, generation interconnection requests, transmission owner additions, and proposed economic projects.[774]

625. As a result of the Plan, SPP directs member transmission owners to build all necessary transmission expansions, additions, and upgrades in order to provide sufficient and reliable transmission service within the region.[775]

626. SPP also implements certain cost allocation methods for transmission expansion plans that allocate a portion of the investment costs to all members for those transmission additions that provide regional benefits.[776]

627. SPP serves as KCPL's Reliability Coordinator in order to meet specific reliability requirements set forth in North American Electric Reliability Corporation ("NERC") reliability standards.[777]

628. KCPL submits real-time and planned transmission operations information to the SPP for review and approval on a coordinated regional basis.[778]

629. SPP also provides critical emergency operations and black-start coordination for the region.[779]

630. As the Reliability Coordinator, SPP has the authority to give reliability directives to member owners in order to ensure stable and reliable bulk power grid operations.[780]

631. Aquila is a conditional member of the MISO RTO. Certain regulatory approvals are still pending for continued participation.[781]

632. Due to the potential of KCPL and Aquila having membership in separate RTOs, KCPL will evaluate the strategy of RTO membership when the merger is completed. It is anticipated that certain specific conditions Aquila currently has in process for approvals, including interconnection agreements and the release of functional

[773] *Id*.
[774] *Id*.
[775] GPE/KCPL Exh. 24, Spring Direct pp. 3-11.
[776] *Id.*
[777] *Id.* at p. 9.
[778] *Id.* at p. 9.
[779] *Id.* at p. 9.
[780] *Id.* at p. 9.
[781] *Id.*

control to an RTO, will be considered within a plan for RTO participation. Also, consideration will be given to the results of a pending consulting study evaluating the benefits of Aquila's full participation in various RTO options including SPP and MISO.[782]

633. There are significant benefits for operating the combined companies within a single RTO structure. The following are benefits that are expected to be derived from a single RTO membership:[783]

19. 1. Membership in a single RTO will avoid transmission seam issues between KCPL and Aquila. Establishing the SPP-MISO seam outside the companies' areas may reduce the number of flowgates on the companies' transmission facilities that will have transmission capacity allocated between the two RTOs. In general, keeping the RTO seam outside KCPL's and Aquila's area will simplify the management of transmission capacity and increase the flexibility of power transactions.

20. 2. Maintaining a single RTO structure will reduce costs related to support and participation in stakeholder activities such as governance, market development, transmission planning and expansion, reliability standards development and tariff administration. Furthermore, participating in one RTO will achieve additional savings by allowing one regional transmission tariff, which simplifies administration and minimizes revenue recovery applications and tariff filings to the Federal Energy Regulatory Commission.

21. 3. Cost allocation methods with a single RTO structure for future transmission upgrades will maintain consistency across both companies, thereby ensuring coordinated transmission cost sharing, lower administrative costs, and more congruent investment structures. It also will facilitate consistent retail rate structures for that portion of retail rates associated with transmission expenditures and investments.

22. 4. Transmission planning and expansion will be more effective from one RTO due to inclusion of both

[782] *Id.*
[783] GPE/KCPL Exh. 24, Spring Direct, pp. 9-11.

companies' facilities in one planning process that develops regional solutions. KCPL and Aquila being in separate RTO transmission expansion plans could result in solutions that are not only inefficient or redundant for the companies, but also possibly conflicting.

23. 5. Finally, a single structure for reliability coordination ensures the consistent development and adherence to bulk power reliability standards and criteria. While all owners, operators and users of transmission facilities must meet grid-wide NERC reliability criteria, specific reliability criteria also exist for each region. Attempting to meet two separate sets of regional reliability criteria adds unnecessary additional burdens and can have the potential for conflicting criteria. Therefore, effectively managing operations, planning and other critical functions related to the reliability of the transmission grid will be best facilitated with one set of regional criteria, which will be provided if both companies operate entirely within the control of only one regional reliability entity.

24. 2. Conditioning Approval of the Merger

634. Dogwood witness Robert Janssen, Independence witnesses Paul Mahlberg and Mark Volpe, and MJMEUC witness John E. Grotzinger all suggest that the Commission should condition its approval of the merger on several conditions: (1) requiring Aquila join the SPP; (2) requiring the quantification of joint dispatch; and (3) requiring KCPL and Aquila to consolidate their balancing authority.[784]

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[784] Dogwood Energy Exh. 700, Janssen Rebuttal, pp. 1-14; Independence Exh. 1300, Mahlberg Rebuttal, pp. 1-8; Independence Exh. 1305, Volpe Rebuttal, pp. 1-41; MJMEUC Exh. 800, Grotzinger Cross-Surrebuttal, pp. 1-11; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

Robert Janssen has held the position of Vice President for Kelson Energy Inc. ("Kelson") since February 2007. From October 2005 to February 2007, he was a Director with Kelson. He also holds the position of President of Redbud Energy, L.P., which is a 1,200 MW generating facility wholly owned by Kelson and located in Oklahoma. Kelson is a power generation holding company that wholly owns Dogwood Energy, LLC, and the Dogwood 600 MW combined cycle generating facility located in Aquila's MPS service territory. He holds a B.S. in Mechanical Engineering with a Minor in Economics from the University of Pennsylvania and has completed Finance and Accounting Graduate Level Classes at Johns Hopkins University. He has held past positions as a Commercial Engineer with UGI Utilities, Inc., as Project Director for Boston Pacific Company, Inc. His

a. RTO Membership

635. Independence witnesses Paul Mahlberg and Mark Volpe suggest that the Commission must consider, in this case, costs that are passed on to retail customers, including what they describe as the significant cost differences of participation in SPP or MISO.[785]

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experience includes: (a) development and management of generating facilities; (b) analysis of electricity markets and transmission systems; (c) analysis of, and development of testimony regarding, utility rates and other filings before federal and state regulatory commissions; (d) due diligence analysis of power purchase agreements and fuel contracts; (e) financial analysis of utility and independent power producer assets such as power plants and water supply systems; and (f) monitoring and reviewing the results of power supply RFPs. He is responsible for the operations of the Redbud Energy generating facility, representing Kelson and its subsidiaries at the SPP RTO, state and federal regulatory affairs, power market development, and NERC compliance for approximately 4,000 MW of Kelson's generating capacity within the United States, including Dogwood's Missouri facility. This includes coordinating Dogwood's potential future participation in electricity markets in SPP. He has submitted written testimony in eight prior proceedings before FERC, the Louisiana Public Service Commission, the Oklahoma Corporation Commission, the Public Service Commission of Wisconsin, the City Council of New Orleans, and the Public Utility Commission of Texas.

[785] Independence Exh. 1300, Mahlberg Rebuttal, pp. 1-8; Independence Exh. 1305, Volpe Rebuttal, pp. 1-41; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

Paul N. Mahlberg is employed by the City of Independence, Missouri, as Planning and Rates Supervisor for the Power & Light Department. His responsibilities include power supply resource planning, power contract administration, fuel planning and procurement, fuel contract administration, cost-of-service, retail rate development, transmission service procurement, and strategic planning. He serves as Independence's representative on the Markets and Operations Policy Committee for the SPP. He graduated from Iowa State University in 1988 with a Bachelor of Science degree in Electrical Engineering. He began his career with Independence in January 1996 as a Senior Planning Engineer working on resource planning, wholesale and retail rate activities, and contract administration and was promoted to his current position of Planning & Rates Supervisor in October 2001. Prior to working for Independence, from 1988 to 1996, he held several positions at R.W. Beck, an engineering consulting firm. He has not previously testified before the Commission or any other utility regulatory agency.

Mark J. Volpe is employed by the law firm of Jennings, Strouss & Salmon, PLC as a non-lawyer consultant. His firm has been retained by the City of Independence, Missouri to assist them in evaluating the effects of the proposed merger between KCPL and Aquila. He holds a Bachelor of Science degree in Business Administration, majoring in accounting and legal studies, from Ohio Northern University (1981) and a Masters in Business Administration from Ashland University (1988). From March 2000 through April 2007, he worked for MISO serving in the capacity as the company's Director of Regulatory Affairs. Prior to working for the MISO, he worked for Cinergy Corporation from 1997 to 2000 as a Senior Contract Analyst in the Energy Delivery Business Unit. Prior to that, he worked for FirstEnergy Corporation from 1987 to 1997. As a non-lawyer consultant, he works with clients in the areas of retail and wholesale electric cost of service development, support

636. Witness Volpe describes and contrasts the energy market between SPP and MISO as follows:[786]

> The SPP energy market consists primarily of a market for Imbalance Energy. Imbalance energy is the difference between the amount of energy that actually flows from each generator and to each load, and the amount that was prearranged through schedules. Under the SPP market, the Energy Imbalance Service ("EIS") is the dollar amount associated with imbalance energy. The calculation is based on the amount of imbalance energy (in megawatts) multiplied by a price at a specific point on the energy grid. SPP conducts a regional dispatch calculated using a security constrained, offer-based economic dispatch ("SCED") every 5 minutes. More simply put, in many ways the SPP is a spot balancing market; there is no day-ahead market and SPP does not utilize the LMP concept, as is the case in the Midwest ISO. In its place, SPP relies upon Locational Imbalance Pricing at a nodal level. Generation resources make voluntary offers of their resources for the EIS or may self-commit their resources. This is in contrast to the Midwest ISO market where Network Resources are required to submit offers to supply their generation in the Day-Ahead. The EIS is settled on an hourly basis. The major difference between the SPP model and the Midwest ISO's market is that there is no financially binding Day-Ahead energy market within SPP's market design and the majority of the transactions occur on a bilateral basis. Furthermore, in SPP there are no FTRs to provide customers with the opportunity to hedge against the costs of congestion as is the case in an LMP based market. SPP's market is rooted in a defined set of physical transmission rights.

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and analysis. This consulting work also includes tariff matters on issues including, but not limited to revenue sufficiency guarantee charges, grandfathered agreements, and RTO membership evaluation criteria and analysis. He also provides: energy market and transmission service related overviews for state regulatory commissions and consumer advocate groups; transmission expansion system planning, cost recovery mechanisms, transmission pricing proposal consulting; and interconnection agreement negotiations. He has previously sponsored testimony before FERC.

[786] Independence Exh. 1305, Volpe Rebuttal, pp. 9-11.

> While there are some similarities, there are major differences between the two markets. SPP is a voluntary market rooted in a bilateral transaction where market participants can obtain balancing energy from a spot energy market, using Locational Imbalance Pricing and a set of physical rights. Participation in the Midwest ISO's market is mandatory for generators that are network resources, and the Midwest ISO uses a two-settlement system based on LMP where congestion costs are hedged using an allocation of FTRs. The Midwest ISO's market design is more complex.

637. Witness Volpe provided the Commission with an in-depth description of the cost differences associated with membership in either SPP or MISO and explained how the "City of Independence cannot even begin the process of attempting to analyze the effect of the RTO membership decision on its customers until KCPL and Aquila make a commitment as to their RTO plans."[787]

638. MJMEUC witness John E. Grotzinger: (1) supported the testimony by Independence and Dogwood requesting a Commission decision to condition approval of the merger upon RTO selection;[788]

[787] Independence Exh. 1305, Volpe Rebuttal, p. 13. Mr. Volpe's explains, compares and contrasts the key differences between the two RTOs related to: 1) the basic functions of their energy markets; 2) the mechanisms used to recover their respective RTO's administrative costs; 3) the potential exposure to energy market charges that are uplifted to load such as Revenue Neutrality Uplift "(RNU"); the procurement of ancillary services; 5) rate pancaking for transactions between the various RTOs; 6) the RTO's plans for additional regional transmission infrastructure expansion and the associated cost allocation implications; and 7) the economic and reliability benefits which can be obtained as a result of a single dispatch. See Exh. 1305 generally.

[788] MJMEUC Exh. 800, Grotzinger Cross-Surrebuttal, pp. 5-8.

John E. Grotzinger is employed by the MJMEUC as Executive Director for Engineering Operations. He is responsible for engineering and system planning for MJMEUC and operations of MoPEP. His responsibilities include planning for power supply and transmission needs of MoPEP and securing power supplies and associated transmissions arrangements. He received his Bachelor of Science degree in Electrical Engineering from the University of Missouri-Columbia in 1979, and began his career at KCPL as an Engineer in the System Planning Department, doing both transmission and generation planning. In 1980, he began work for City Utilities of Springfield, Missouri as an Engineer in the System Planning Department, and for the next fourteen years he performed electric transmission, electric generation, electric distribution, gas distribution, and water distribution planning studies. In 1994, he began working for MJMEUC and in 1999 he became Executive Director for Engineering & Operations. He is a Registered Professional Engineer in the State of Missouri. He has testified previously before this Commission in Case No. EA-

(2) concurred with the results of Aquila's RTO study that indicates that SPP offers greater benefits in RTO operation than does MISO;[789] (3) raised concerns with the treatment of the Applicants' other transmission facilities because of joint use lines;[790] and (4) raised concerns with respect to generation issues arising out of MJMEUC's participation in KCPL's Iatan Unit 2.[791]

639. A full and thorough record is being developed in EO-2008-0046 concerning the benefits and costs associated with Aquila's RTO status. In particular, there has been extensive evidence concerning the relative cost-benefit analyses of Aquila joining MISO, SPP, or reverting back to a stand-alone transmission provider. Such evidence is critical for the Commission's evaluation of which RTO, if any, would best serve Aquila and its customers.[792]

640. Evidentiary hearings in EO-2008-0046 were held on April 14-16, 2008, and post-hearing briefs were due in that matter on May 29, 2008.[793]

641. Independence and Dogwood are participating in the Aquila MISO Proceeding (EO-2008-0046) and are representing identical positions in that matter.[794]

2005-0180, and he has participated in several Commission roundtables and workshops including the roundtable on electric deregulation in the late 1990's and the subsequent RTO and transmission discussions over the last five years.

[789] MJMEUC Exh. 800, Grotzinger Cross-Surrebuttal, pp. 5-8.

[790] Specifically, the Missouri-Iowa-Nebraska Transmission ("MINT") facilities. MJMEUC believes the ownership in MINT by KCPL is covered in the SPP tariff and that the Aquila MINT facilities likewise should be covered by the SPP tariff. MJMEUC Exh. 800, Grotzinger Cross-Surrebuttal, pp. 8-10.

[791] Splitting Iatan 2 across two RTOs causes some concern because KCPL is the majority owner and operator of Iatan 2. Thus, adding control of Aquila's share in Iatan 2 gives KCPL a super majority for decision making. Use of Iatan 2 by the balancing authority of KCPL is implied for Iatan, but expanding it even further through a merger with Aquila without some sort of continuing regulatory oversight or safeguards could impact operations for MJMEUC and Missouri's municipal customers throughout the state. MJMEUC Exh. 800, Grotzinger Cross-Surrebuttal, pp. 10-11.

[792] See In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc., Case No. EO-2008-0046, Application filed August 20, 2007; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[793] See *Order Modifying Procedural Schedule*, effective January 23, 2008, In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc., Case No. EO-2008-0046.

642. Independence and Dogwood intervened in the application for FERC approval of the merger, Docket Nos. EC07-99-000 and EL07-75-000 ("FERC Merger Proceeding"). Both parties raised the same potential RTO-related cost effect arguments before FERC. [795]

643. Independence requested that FERC condition its approval of the merger on KCPL and Aquila being in a single RTO. Dogwood requested that FERC condition its approval of the merger on Aquila joining the SPP.[796]

644. In its October 19, 2007 order, FERC stated as follows:

> 25. We will decline the protestors' request to condition our section 203 authorization on the Applicants joining a particular RTO. When necessary, the Commission [FERC] conditions merger authorization in order to address specific, merger-related harm; but no such harm has been identified in this proceeding. Moreover, the Applicants' future RTO status is unclear at this time and therefore, there is no baseline against which to assess merger-related changes to rates.[797]

645. FERC expressly considered Independence's assertions concerning the different cost structures of SPP and MISO, the same issues as those raised in the Rebuttal Testimony of Mark Volpe, Paul Mahlberg, and Robert Janssen in this case. FERC declined to condition the merger on a particular RTO status for KCPL or Aquila.[798]

b. Quantification of Joint Dispatch

646. Assuming the merger is approved, KCPL plans to operate post-merger with two control areas – one for KCPL and one for Aquila. [799]

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[794] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9. See Docket entires for EO-2008-0046. See in particular: *Order Granting Intervention and Scheduling Prehearing Conference*, issued September 28, 2007; and *Order Granting Late-filed Application to Intervene*, issued November 13, 2007.

[795] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[796] Dogwood Energy Exh. 700, Janssen Rebuttal, pp. 1-14; Independence Exh. 1300, Mahlberg Rebuttal, pp. 1-8; Independence Exh. 1305, Volpe Rebuttal, pp. 1-41; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[797] *Great Plains Energy Inc.*, *et al.*, Order Authorizing Disposition and Acquisition of Jurisdictional Facilities and Granting Petition for Declaratory Order, 121 FERC ¶ 61,069 at P 50 (October 19, 2007); GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[798] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

[799] *Id*.; GPE/KCPL Exh. 11, **Crawford Direct**, p. 5.

F. Dana Crawford is employed by KCPL as Vice President of Plant Operations. His responsibilities include the direction of the operation and maintenance of KCPL's fossil-fuel

647. Great Plains and KCPL plan to evaluate whether to combine the two control areas into one in order to provide joint dispatch capabilities after the merger transaction is consummated and that decision will be subject to regulatory review.[800]

648. During the FERC Merger Proceeding, Independence argued that KCPL and Aquila must quantify the effects of joint dispatch before being permitted to merge.[801] In response, FERC found as follows:

> 26. Independence's argument that the [Federal Energy Regulatory] Commission cannot reasonably conclude that proposed transaction presents neither horizontal nor vertical market power issues without analyzing the possibility of joint dispatch of KCP&L's and Aquila's generation is misplaced. First, our analysis focuses on merger-related effects on competition, and there is no evidence in the record that KCP&L and Aquila plan to engage in joint economic dispatch following the merger. Second, even if KCP&L and Aquila do pursue a joint economic dispatch agreement, Applicants have shown that the merger will not adversely affect competition. Regarding horizontal market power, Applicants' analysis shows that the combination of KCP&L's and Aquila's generation will not materially increase market concentration using the AEC measure, indicating that the merger will not harm competition in the relevant market; thus, even if Applicants do engage in joint dispatch, the merger will not create or enhance the ability to exercise market power. Further, if KCP&L and Aquila do pursue a joint dispatch agreement, they will

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generating stations, including their support and construction services. He graduated from the University of Missouri-Columbia with a degree in Civil Engineering, and also has a Master of Business Administration degree from DePaul University. He joined KCPL in 1977 as a Construction Engineer on the Wolf Creek Nuclear Plant project. In 1980, he was promoted to Manager, Nuclear and promoted to Director, Nuclear Power in 1983. Following completion of Wolf Creek, he became Manager, Distribution Construction & Maintenance, in 1988 and Manager, Customer Services, in 1989. In 1994, he became Plant Manager of the La Cygne Generating Station. He was promoted to his current position in March of 2005. He has testified before this Commission and the Kansas Corporation Commission.

[800] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9; GPE/KCPL Exh. 11, Crawford Direct, p. 5.

[801] Independence Exh. 1300, Mahlberg Rebuttal, pp. 1-8; Independence Exh. 1305, Volpe Rebuttal, pp. 1-41; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.

> need to file an operating agreement with the [Federal Energy Regulatory] Commission, at which time Independence will have the opportunity to participate in the proceeding and protect its interests. Therefore, we will not require a further analysis of the effect of joint dispatch or condition section 203 approval on Applicants not engaging in joint dispatch, as proposed by Independence.[802]

649. FERC expressly considered the same arguments Independence raises here and denied it the relief it sought.[803]

c. Consolidation of Balancing Authority Operations

650. Dogwood witness Robert Janssen recommends that the Commission condition its approval of the merger on KCPL and Aquila being required to consolidate their Balancing Authority operations.[804]

651. Currently, SPP is developing additional market services beyond the current Energy Imbalance Service. SPP's efforts include consolidating Balancing Authority operations, as well as providing ancillary services and other future market services. With a potential for consolidated Balancing Authority service across the SPP footprint, participating members would achieve a number of benefits including, among other things, additional generation efficiencies due to joint economic generator dispatching and shared spinning reserves.[805]

652. KCPL anticipates participating in a fully operational, consolidated Balancing Authority market function given the determination of an appropriate level of operational efficiencies and benefits to its customers if such region-wide consolidated Balancing Authority services are developed by SPP.[806]

653. Until SPP completes developing additional market services, it would be premature and potentially redundant for KCPL and Aquila to pursue consolidation of their Balancing Authority operations.[807]

654. Independence witness Paul Mahlberg raises a concern about the merger's effect on transmission availability; however, the

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[802] *Great Plains Energy Inc.*, *et al.*, 121 FERC ¶ 61,069 at P 36 (2007); GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[803] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[804] Dogwood Energy Exh. 700, Janssen Rebuttal, pp. 1-14; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[805] GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[806] *Id*.
[807] *Id*.

combined companies will continue to provide transmission service through a single RTO and an associated OATT.[808]

655. Independence also raised concerns about the merger's effect on transmission availability in greater detail in the FERC Merger Proceeding. In that proceeding, Independence argued that KCPL and Aquila had not adequately evaluated the effect of the merger on transmission availability as part of their market power analysis in support of their application.[809]

656. FERC addressed Independence's concerns about transmission availability, finding:

> 27. We find that the Applicants have shown that the proposed transaction will not adversely affect competition. Regarding the horizontal combination of generation capacity, Applicants' analysis shows that for all relevant geographic markets, there are no screen failures for AEC, the relevant measure in this case, indicating that it is unlikely that the transmission will harm competition. In addition, the Black Hills Acquisition will not result in the consolidation of generating assets in any relevant market. Given that the proposed transaction does not materially increase the merged firm's market share or market concentration, we conclude that it is not likely to create or enhance Applicants' ability to exercise market power in any wholesale electricity markets. Regarding the vertical combination of upstream transmission and natural gas assets with downstream generating capacity, Applicants have shown that the proposed transaction will not create or enhance the ability or incentive to use control of upstream assets to harm competition in downstream wholesale electricity markets. We reach this conclusion because: (1) Applicants' transmission facilities will be operated pursuant to an OATT, thus ensuring that they cannot be used to frustrate competition in wholesale electricity markets; and (2) there is no overlap between Applicants' natural gas transportation assets and downstream electric generation capacity in any relevant

808 Independence Exh. 1300, Mahlberg Rebuttal, pp. 1-8; GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
809 *Id*.; Independence Exh. 1305, Volpe Rebuttal, pp. 1-41.

> wholesale market. We discuss the specific issues raised by protestors below. Independence argues that Applicants fail to show that Independence will not be affected by decreased transmission availability. However, it does not offer any evidence that less transmission will be available to it. Applicants' transmission system is subject to a Commission-approved OATT, which ensures open access to the transmission system. Regarding merger-related increases in vertical market power, we are not persuaded by Independence's argument. Applicants' transmission facilities are currently and will continue to be operated pursuant to an OATT, thus ensuring that they cannot be used to frustrate competition in wholesale electricity markets.[810]

657. FERC expressly considered the same arguments Independence raises in this proceeding and denied Independence the relief it sought.[811]

658. FERC concluded that the merger does not create any transmission availability concerns.[812]

K. Findings of Fact Regarding Municipal Franchise Agreement with KCMO

659. In 1881, Kansas City and KCPL's predecessor-in-interest entered into a Franchise Agreement that sets forth the respective parties' rights and obligations.[813]

660. Kansas City also has a franchise agreement with Aquila that currently remains in effect, but that will be subject to renegotiation when it expires in December of 2008.[814]

661. KCPL is experienced in operating under multiple franchises, with approximately 70 different franchises across its territory.[815]

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[810] *Great Plains Energy Inc.*, *et al.*, 121 FERC ¶ 61,069 at P 34, 35 and 37 (2007) (footnotes omitted);GPE/KCPL Exh. 25, Spring Surrebuttal, pp. 1-9.
[811] *Id*.
[812] *Id*.
[813] Transcript, pp. 2153 and 2210. See also KCMO Exh. 402.
[814] Transcript, pp. 2153-2154, 2157-2158, and 2202.
[815] Transcript, p. 2233.

662. Based upon the testimony of the witnesses, the Kansas City Franchise Agreement does not contain a limitation on its duration.[816]

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[816] See testimony of KCMO witnesses, Cauthen and Hix; KCMO Exhs. 400 and 401; GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19; Transcript, pp. 2132-2237. See in particular Transcript, p. 2153, lines 7-12.

Wayne A. Cauthen is the City Manager for Kansas City. He was appointed by Kansas City in this capacity in April of 2003. He is Kansas City's chief administrator and his overall responsibility is to ensure that the city government runs efficiently and economically. He advises the Mayor and the City Council and he appoints all department directors except for the Director of Parks and Recreation. He prepares a proposed annual budget for the Council's consideration, and his work also includes enforcing municipal laws and ordinances and coordinating city operations and programs. His office provides staff support services to the City Council and its committee meetings, and coordinates the development and analyses of policy recommendations presented to the Mayor and the City Council. He has over 25 years of professional experience in the public and private sectors. He graduated from Central State University in Wilberforce, Ohio, with a degree in political science and also completed graduate studies in political science at the University of Colorado. Prior to his employment with Kansas City, he worked as Chief of Staff for Denver Mayor Wellington Webb from 2000 to 2003. He served as Webb's deputy Chief of Staff from 1997 to 2000 and as the director of the Mayor's Office of Contract Compliance from 1993 to 1997. During his tenure in Denver, he managed nine cabinet-level departments and eleven agencies and he served on several boards including the Denver Housing Authority Board of Directors, the Stapleton Redevelopment Board, and the Denver International Airport Business Partnership Board. He also worked for the State of Colorado Capital Complex Divisions and the Colorado Minority Business Development Agency. Prior to his work for the City and County of Denver, he was an administrator for the Space Launch Systems at Martin Marietta, which is now Lockheed Martin located in Littleton, Colorado. He has not previously testified before the Commission or any other utility regulatory agency.

Robert J. Hix is an independent consultant in utility regulation, policy and operations. He has been retained by the law firm of Kamlet Shepherd & Reichert, LLP on behalf of Kansas City. His role began as an advisor to Kamlet Shepherd in reviewing the case filed by the Applicants. He has spent most of his working life in utility regulation as a regulator, advocate, and consultant. His employment in utility operations began in September 1971 and continued in some fashion for the last thirty-six years. He worked in various capacities for a large combined electric and natural gas company in Colorado from September 1971 through November 1983. In December 1984, he became the senior technical expert witness for the newly formed Colorado Office of Consumer Counsel. In May 1994, he was confirmed as the Chairman of the Colorado Public Utilities Commission. Upon completion of his two terms on that Commission, he left state service in May of 2001. He joined a Boston-based energy consulting firm in August 2001 and opened a western office near Denver, Colorado. He left the consulting firm in March 2004 when he accepted a position as with Xcel Energy as Director, Regulatory & Strategic Analysis. In June 2006, he retired from Xcel Energy. In January 2007, he began accepting invitations for occasional consulting projects in the arena of regulatory policy and operations. While employed by the

663. Great Plains' and KCPL's witness John Marshall has testified that the Franchise Agreement between KCPL and Kansas City is a valid and binding contract that sets forth the rights and obligations of each signatory.[817]

664. Kansas City has not provided any testimony controverting witness Marshall's testimony that the Franchise Agreement between KCPL and Kansas City is valid and enforceable.[818]

665. Kansas City has not provided any testimony controverting the validity and enforceability of the Franchise Agreement between Aquila and Kansas City.[819]

666. Kansas City has requested that the Commission condition the approval of the current merger request on having KCPL abrogate the Franchise Agreement with the city and renegotiate a new franchise agreement with Kansas City.[820]

667. Over the years Kansas City has expressed interest in renegotiating certain aspects of the Franchise Agreement and KCPL has entertained some of Kansas City's proposals, KCPL has elected to maintain the rights contained in the Franchise Agreement because they provide significant benefits to KCPL's customers.[821]

668. Kansas City's request that the Commission condition approval of the merger upon the renegotiation of the Franchise Agreement is premised on its claims that it lacks adequate guidance in determining who pays the costs associated with relocations, line extensions, and undergroundings.[822]

669. Disputes over requests for relocations and line extensions are limited, in general, to the issue of who is responsible for these costs.[823]

Colorado Office of Consumer Counsel, Xcel Energy and consulting, he testified numerous times before the Colorado PUC and Wyoming PSC in the areas of electric, natural gas and telecommunications engineering, pricing and rate design matters. Additionally, he has appeared before FERC.

[817] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19; Transcript, p. 2202. See also KCMO Exh. 402.

[818] See testimony of KCMO witnesses, Cauthen and Hix; KCMO Exhs. 400 and 401; Transcript, pp. 2132-2195.

[819] See testimony of KCMO witnesses, Cauthen and Hix; KCMO Exhs. 400 and 401; Transcript, pp. 2132-2195.

[820] KCMO Exh. 400 Cauthen Rebuttal, pp. 3-4 and 10-11.

[821] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[822] KCMO Exh. 400 Cauthen Rebuttal, pp. 3-4 and 10-11. See also Transcript, pp. 2132-2159.

[823] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

670. KCPL's Commission-approved tariffs provide guidance on the question of who pays for relocation costs, line extensions, and undergroundings and ensure that KCPL's customers do not subsidize the development costs of private entities. [824]

671. Missouri common law also provides guidance on the issue of relocation and line extension costs.[825]

672. Missouri law states that utilities must relocate their facilities located in public right-of-ways at their own expense if the change or improvement necessitating the relocation is for a government purpose. If, however, the relocation is for a private or proprietary purpose, utilities are entitled to be reimbursed for the costs associated with a relocation or line extension.[826]

673. Issues of relocation and subordination that concern Kansas City are dealt with through KCPL's line extension policy.[827]

674. Consistent with its tariffs, KCPL seeks reimbursement for relocation or line extension costs that can be traced backed to the development of private property by developers. The fact that these developers are working closely with Kansas City does not permit these developers to shift their costs to KCPL's customers.[828]

675. To protect its customers from overreaching, KCPL makes case-by-case determinations to ensure development costs are not shifted from developers to KCPL's customers.[829]

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[824] *Id*. See also Section 15.08, Changes and Removal, Municipal Lighting Service, KCPL General Rules and Regulations, P.S.C. Mo. No. 2 (Tariff Sheets 1.51-52) (1989). *Id.*, Section 10.03(e)(v), Underground Distribution System in Residential Subdivisions. The Commission takes official notice of KCPL's tariffs that are on file with the Commission.

[825] See *City of Bridgeton v. Missouri-American Water Co*., 219 S.W.3d 226, 232 (Mo. banc 2007), quoting *Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis,* 555 S.W.2d 29, 32 (Mo. banc 1977) -- "The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity, or public convenience and security require it, at its own expense." See also *Riverside-Quindaro Bend Levee Dist., Platte County, Missouri v. Missouri American Water Co*., 117 S.W.3d 140 (Mo. App. 2003).

[826] *Id.* See also *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.,* 784 S.W.2d 287 (Mo. App. 1989); GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19; Transcript, pp. 2212, 2233.

[827] Transcript, p. 2233. The current Franchise Agreement between Kansas City and KCPL does not address subordination issues. Transcript, p. 2212. See also Section 15.08, Changes and Removal, Municipal Lighting Service, KCPL General Rules and Regulations, P.S.C. Mo. No. 2 (Tariff Sheets 1.51-52) (1989). See also *id*., Section 10.03(e)(v), Underground Distribution System in Residential Subdivisions.

[828] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[829] *Id*.

676. Over the past several years KCPL has received thousands of requests for relocations and line extensions. KCPL's records indicate that only two formal complaints have been filed against KCPL.[830]

677. KCPL uses a sophisticated software program that estimates the costs of relocation or line extension projects ("STORMS"). The first step in the process requires KCPL's engineers to determine what facilities will be necessary to complete the project. The engineers enter this information into the STORMS program. Then STORMS generates a detailed estimate of the cost of the project ("STORMS Report").[831]

678. It is KCPL's practice to share the information contained in the STORMS Report with the entity requesting the relocation or line extension. If a customer needs the information contained in the STORMS Report explained to them or makes reasonable requests for additional information, it is KCPL's policy to honor the request.[832]

679. KCPL, as a general rule, does not disclose the locations of its facilities to third parties. Because of heightened security concerns KCPL does not disclose information regarding its infrastructure unless the entity requesting the information has a specific need for the information.[833]

680. To the extent Kansas City has a specific need for information regarding KCPL's infrastructure, KCPL provides that information.[834]

681. KCPL provides adequate information regarding relocation and line extension costs.[835]

682. Consummation of the proposed merger will not extinguish Aquila's corporate existence.[836]

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[830] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[831] *Id*.
[832] *Id*.
[833] *Id*. After the 9/11 terrorism attacks, KCPL took steps to secure its facilities from an attack. *Id*.
[834] *Id*. Although he stated that his public works director had indicated there was a problem receiving maps or drawings from KCPL, Kansas City's witness Cauthen could not provide a single example of KCPL failing to provide a map or drawing of its facilities at Kansas City's request. Transcript, p. 2151.
[835] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[836] *Id*. As noted in various sections of this order, under the terms of the merger agreement, Gregory Acquisition Corp., a direct, wholly-owned subsidiary of Great Plains Energy, will be merged into Aquila, with Aquila as the surviving entity (although Great Plains Energy

683. In addition to maintaining separate corporate entities, KCPL and Aquila will maintain separate control areas for the foreseeable future.[837]

684. In its testimony, Kansas City's witness Mr. Cauthen alleged that it has experienced operational problems with Aquila;[838] however, Mr. Cauthen also described its working relationship with KCPL as, on the whole, "good."[839]

685. There is no evidence in the record that establishes that approval of the merger will result in additional burdens for Kansas City.

686. There is no evidence in the record that establishes that the terms of corporate structure of the merger will result in any changes that will have an adverse effect on Kansas City.

687. The current Franchise Agreements, company tariffs, and Missouri case law provide sufficient guidance and regulation concerning the issues Kansas City raises with regard to its relationship with KCPL and any post-merger relationship Kansas City will have with KCPL and Aquila.

L. Findings of Fact Regarding Municipal Franchise Agreement with St. Joseph

688. St. Joseph has also asked the Commission to condition the approval of the proposed merger upon Aquila negotiating a new municipal franchise with St. Joseph and further requests that a condition be placed upon the newly merged entity to obtain a franchise agreement from each municipality in which it provides service.[840]

689. St. Joseph did not produce a witness to testify before the Commission.

690. St. Joseph offered no prefiled or live testimony on the issue it raises with regard to its current franchise agreement with Aquila.

691. Instead, St. Joseph offered Exhibit 1200 into evidence, which includes an affidavit from the St. Joseph's attorney, Ms. Lisa Robertson, and a letter dated September 24, 2007, from Daniel Vogel to Ms. Renee Parsons.[841]

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anticipates that it will rename Aquila). After the merger closes, Aquila, as well as KCPL, will continue to exist as separate corporate entities.

[837] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.

[838] KCMO Exh. 400, Cauthen Rebuttal, p. 4.

[839] *Id*. at p. 7.

[840] See *Post-Hearing Brief of City of St. Joseph*, filed June 2, 2008, EFIS Docket Number 446, pp. 1-2.

[841] SJMO Exh. 1200; Transcript, pp. 2224-2231.

692. No witness was present at the hearing to authenticate St. Joseph Ex. 1200 and, consequently, St. Joseph Exhibit 1200 lacks a proper foundation and is hearsay.[842]

693. No party was given an opportunity to cross-examine any St. Joseph witness concerning its contention that Aquila's franchise with St. Joseph had expired.[843]

694. The Applicants objected to the admission of Exhibit 1200 on the basis of hearsay, and because the documents were unauthenticated by any witness subject to cross-examination.[844]

695. St. Joseph Exhibit 1200 was received subject to the parties' objections and the presiding Regulatory Law Judge made clear that the Commission would rule on its ultimate admissibility in its final Report and Order.[845]

696. St. Joseph also offered for admission Exhibit 1201, a copy of a portion of the St. Joseph Code, Article XIII on Franchises. The Commission received this exhibit into evidence over objection.[846]

697. St. Joseph, during cross-examination of Witness Marshall, established that "when the time comes," "franchise negotiations . . . between [the] city of St. Joseph and Aquila would actually take place between the city of St. Joseph and Kansas City Power and Light employees acting on behalf of Aquila d/b/a KCPL Great[er] Missouri Operations."[847]

M. Findings of Fact Regarding Proposal to Have KCPL Submit a Separate Quality of Service Plan

698. Kansas City requested that the Commission condition the approval of the Joint Application upon requiring KCPL and Aquila to file an application for a Quality of Service Plan within 90 days of the Commission's final decision in this proceeding.[848]

699. Mr. Hix, when asked if he was familiar with the quality of service standards employed by the Commission also stated:

> I don't have direct knowledge. I have reviewed some of the material related to the rulemaking that the Missouri Commission had engaged in and read some of that

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[842] Counsel for St. Joseph, Mr. Steinmeier, explained that budgetary constraints of his client precluded the production of a witness in this matter. Transcript, p. 2226.
[843] Transcript, pp. 2224-2231.
[844] *Id*.
[845] Transcript, p. 2231.
[846] Transcript, pp. 2224-2231.
[847] Transcript, p. 2224.
[848] KCMO Exh. 401, Hix Rebuttal, pp. 5-10.

> material. Some of that I merely scanned, just for background and understanding the perspective that was brought to that proceeding. I didn't get into the details. I didn't care about the thresholds under SAIFI or SAIDI or CAIFI. That was not my purpose of the testimony in this instance.[849]

700. Kansas City's witness Mr. Hix was unfamiliar with this Commission's vegetation management standards and reliability metrics.[850]

701. Upon questioning by Commissioner Murray, Mr. Hix stated that when he looked at the service quality and earnings sharing issue:

> I didn't give it much emphasis because it's intuitively obvious that one need be careful when an entity has -- has an incentive to cut costs to improve its earnings picture, and that occurs quite frequently under merger situations or acquisition situations. And so that's why I would say that there is a link between service quality, having metrics that work, and have them be specific to the utility, and put some teeth to those and allow for reparations to be returned to customers when the company fails to perform up to those standards. That's the service quality.[851]

702. Mr. Hix further indicated that if the Commission had rules using basic measures of performance, such as the type outlined in his prefiled testimony, this would satisfy his concerns, but added that there should also be provisions for reparations to customers when a company underperforms.[852]

703. Kansas City has not suggested any specific service quality standards when making this recommendation, but its witness, Mr. Hix, confirmed that System Average Interruption Frequency Index ("SAIFI"), System Average Interruption Duration Index ("SAIDI") and Customer Average Interruption Duration Index ("CAIDI") were all "good measures".[853]

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[849] Transcript, p. 2168
[850] Transcript, p. 2168-2169.
[851] Transcript, pp. 2171-2172.
[852] Transcript, pp. 2173.
[853] KCMO Exh. 401, Hix Rebuttal, pp. 1-10; Transcript, pp. 2168 and 2178.

704. The Commission's Staff already reviews the performance measures mentioned by Mr. Hix as part of its Cost of Service report when a utility files a rate case.[854]

705. In KCPL's last rate case (ER-2007-0291), the Staff reviewed five years of data for SAIFI, SAIDI, CAIDI,[855] and the Momentary Average Interruption Frequency Index ("MAIFI") and found no evidence of long term trends that should be cause for concern by the Commission.[856]

706. Kansas City's witness Mr. Hix could not list any of the synergies that KCPL is proposing in the area of customer service or how these synergies would affect customer service.[857]

707. Great Plains' and KCPL's witness Mr. Herdegen testified to numerous steps being initiated by KCPL to ensure that service quality does not decline, including adding 42 employees in the customer service area on Day One post-merger.[858] (See Findings of Fact Section for Service Quality for a more specific and detailed analysis of the Service Quality issues.)

708. Although there may be an increased risk of service quality degradation when utility operations and functions are integrated, Mr. Hix presented no credible evidence that customer service would be affected by the transaction.[859]

N. Findings of Fact Regarding Proposal to Have KCPL Establish an Earnings Sharing Mechanism

709. Kansas City requested that the approval of the merger be conditioned upon the establishment of an Earnings Sharing Mechanism that returns to customers excess earnings of KCPL and Aquila above an authorized rate of return to customers.[860]

710. Kansas City's witness Mr. Hix testified that this mechanism should involve annual evaluations of the earnings picture of the company and his preferred method of returning excess earnings to

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[854] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19.
[855] CAIDI equals SAIDI divided by SAIFI.
[856] GPE/KCPL Exh. 22, Marshall Surrebuttal, pp. 1-19, see in particular p. 19.
[857] Transcript, pp. 2192 and 2193.
[858] Transcript, p. 2295.
[859] KCMO Exh. 401, Hix Rebuttal, pp. 1-10; Transcript, pp. 1877-1878. The Commission notes that in its credibility findings it was determined that Witness Schallenberg was not an expert on Service Quality; however, this particular statement with regard to general risk did not require subject matter expertise. Transcript, pp. 2160-2200.
[860] KCMO Exh. 401, Hix Rebuttal pp. 6-8. KCMO Exh. 401; Transcript, pp. 2160-2200.

the customers utilizes a "reverse taper" whereby after greater excess earnings are achieved, more is retained by the utility.[861]

711. Mr. Hix testified that he agreed that the electric utility industry is in a rising cost environment and in a construction phase.[862]

712. Mr. Hix did not review any earnings sharing mechanisms or grids approved by this Commission.[863]

713. Mr. Hix also testified that he had not reviewed other Commission approvals of electric company mergers.[864]

714. Mr. Hix does not know the specifics of KCPL's infrastructure investments contained in its Regulatory Plan.[865]

715. Mr. Hix did not review KCPL's two rate cases filed since the approval of the Regulatory Plan and did not calculate KCPL's actual rate of return.[866]

716. The last earnings sharing mechanism that Mr. Hix designed and was familiar with was in effect from 1997 to 2001.[867]

717. KCPL and Aquila are currently engaged in major generation construction programs, and both companies will need to raise additional capital beyond their current construction programs to meet environmental regulations.[868]

718. KCPL and Aquila intend to file rate cases with the Commission in the year after the proposed transaction closes (assuming Commission approval). Approved rate increases resulting from these cases will be necessary to recover the costs of the infrastructure as it is placed into service, and those costs will exceed the total estimated synergies of the acquisition during the next several years.[869]

719. The realized synergies from the merger will result in requiring smaller rate increases than would have been required absent the transaction, but initially there will be no excess earnings to share.[870]

720. Earnings sharing mechanisms are used when the cost of service is expected to be flat or declining over the time the synergies are

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[861] KCMO Exh. 401, Hix Rebuttal, pp. 6-8.
[862] Transcript, p. 2163.
[863] Transcript, p. 2169.
[864] *Id*.
[865] Transcript, pp. 2163-2164.
[866] Transcript, p. 2165.
[867] Transcript, p. 2167.
[868] GPE/KCPL Exh. 15, Giles Surrebuttal, p. 13.
[869] *Id*. at p. 14.
[870] *Id*. at p. 13-15.

expected to occur.[871] Absent increases in cost of service, the synergies would result in excess earnings above an authorized rate of return.

721. Any savings derived from synergies as a result of the merger, as the merger proposal is structured, will be shared through the mechanism of regulatory lag.[872]

722. Kansas City presented no credible evidence that any detriment would result if the merger was not conditioned upon establishing an earnings sharing mechanism, other than the method of regulatory lag.[873]

O. Findings of Fact Regarding a Future Rate Case

723. Kansas City has also requested that the Commission condition the approval of the merger upon requiring KCPL and Aquila to file a comprehensive rate case with respect to the "merged" operations within three years of the Commission's approval of the merger.[874]

724. As part of this proposed condition, Kansas City requests the Commission to order the company to file a proposal to integrate financial operations and electric system operations into a cost structure that can be comprehensively evaluated for efficiencies and improved operations.[875]

725. The Applicants, however, are not proposing to merge KCPL with Aquila,[876] and the timing of KCPL's rate cases are already influenced by its commitments and activities under the Regulatory Plan Stipulation, Case No. EO-2005-0329.[877]

726. Kansas City's witness testifying on this issue, Mr. Hix, did not review the Regulatory Plan regarding KCPL's future rate cases.[878]

727. Kansas City presented no credible evidence that any detriment would result if the merger was not conditioned upon requiring a

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[871] *Id*. p. 13-15.
[872] GPE/KCPL Exh. 37, Bassham, Additional Supp. Direct, pp. 3-4.
[873] KCMO Exh. 401, Hix Rebuttal, pp. 1-10; Transcript, pp. 2160-2200.
[874] KCMO Exh. 401, Hix Rebuttal, p. 4.
[875] *Id*.
[876] GPE/KCPL Exh. 22, Marshall Surrebuttal, p. 16; Transcript, pp. 305-07.
[877] See Case No. EO-2007-0329, *In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company*, Report and Order, effective August 7, 2005 and Order Approving amendments to Experimental Regulatory Plan, effective August 23, 2005.
[878] Transcript, p. 2164.

future comprehensive rate case with respect to what Kansas City is referring to as KCPL's and Aquila's "merged operations."[879]

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Conclusions of Law Regarding Jurisdiction, Applicable Statutes, Burden of Proof, and Applicable Standards for Evaluating the Merger Application[880]

1. Commission Jurisdiction and Authority

Section 386.020(15), RSMo, defines "electrical corporation" as including:

> every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

Section 386.020(42) defines "public utility" as including "every . . . electrical corporation . . . as [this term is] defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

KCPL is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (42), and is subject to the jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. Aquila is an "electrical corporation" and a "public utility," as defined in Sections 386.020(15) and (42), and is subject to the jurisdiction,

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[879] KCMO Exh. 401, Hix Rebuttal, pp. 1-10; Transcript, pp. 2160-2200.
[880] See Findings of Fact 1-163 as they relate to this section.

supervision and control of the Commission under Chapters 386 and 393. Great Plains is not an electrical corporation or public utility as defined in Sections 386.020(15) and (42), and is not subject to the jurisdiction, supervision and control of the Commission.

2. Application of Section 393.190.1

a. The Statute

Section 393.190.1 provides in pertinent part:

> **No** gas corporation, **electrical corporation**, water corporation or sewer corporation **shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, <u>with any other corporation</u>, person or public utility**, **without having first secured from the commission an order authorizing it so to do. . . .**[881]

The Applicants extensively outlined the transactions associated with their merger proposal in their application and by means of the prefiled testimony that was incorporated by reference and filed with the application.[882] The Applicants' wherefore clause in their Application reads as follows:

> WHEREFORE, pursuant to Sections 393.180, 393.190, 393.200, 393.210 and 393.220, as well as 4 CSR 240-2.060, 240-3.020, 240-3.110, 240-3.115, 240-3.120, 240-3.125, and 240- 20.015, Applicants request the Commission to issue an order:
>
> (a) Authorizing Great Plains Energy and Aquila to perform in accordance with the terms and conditions of the Agreement and Plan of Merger, APA, PIPA, and all other transaction-related instruments, and to take any and all other actions that may be reasonably necessary and incidental to the performance of the Merger;
>
> (b) Authorizing Great Plains Energy, via the Merger, to acquire and assume the stocks, bonds, and other

[881] Emphasis added.

[882] *Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc*., pp. 20-21, paragraph 50, filed April 4, 2007; Transcript, pp. 3119-3121; Finding of Fact Numbers 121-163.

indebtedness and obligations of Aquila, all as more particularly described in the Agreement and Plan of Merger;

(c) Authorizing Aquila to merge with Merger Sub, a wholly-owned subsidiary of Great Plains Energy, with Aquila being the surviving corporation, all as more particularly described in the Agreement and Plan of Merger;

(d) Finding that the Merger and other relief sought in this Joint Application are not detrimental to the public interest;

(e) Approving the Regulatory Plan, including Aquila's use of the Additional Amortizations mechanism in its next general rate case after achieving the financial metrics necessary to support an investment-grade credit rating;

(f) Authorizing KCPL and Aquila to establish a regulatory asset and amortize into cost of service costs associated with the Merger, including both transaction and transition-related costs, as properly allocated to KCPL's and Aquila's Missouri regulated operations and excluding the non-incremental labor costs of the integration team, over a five (5) year period beginning on January 1, 2008, or the month immediately following consummation of the Merger, whichever occurs later;

(g) Authorizing KCPL and Aquila, collectively, to retain for a five (5) year period fifty percent (50%) of the synergy savings that result from the Merger, as properly allocated to their Missouri-regulated operations;

(h) Authorizing Aquila to distribute approximately $677 million of the proceeds from the sale of Aquila's non-Missouri properties in a direct or indirect cash distribution to Aquila's shareholders, pursuant to Sections 393.210 and 393.220, as a result of the sale of such properties to Black Hills;

(i) Authorizing Aquila to change its name;

(j) Granting KCPL and Aquila a waiver from the affiliate transaction rule to the extent deemed necessary; and

(k) Granting such other relief as may be necessary and appropriate to accomplish the purposes of the Merger and this Joint Application, and to consummate the Merger and related transactions in accordance with the Agreement and Plan of Merger and this Joint Application.

The Commission has already noted the requests that have been eliminated by the Applicants when they revised their merger proposal, i.e., including subparts (e) and (g).[883]

The transactions proposed ultimately involve a merger of Aquila with Gregory Acquisition Corp., a direct, wholly-owned subsidiary of Great Plains, with Aquila being the surviving entity. As a result of the merger, Aquila will become a direct, wholly-owned subsidiary of Great Plains, just as KCPL. KCPL and Aquila will be affiliated entities by virtue of Great Plains' common ownership of both. Although Aquila and KCPL will remain separate legal entities, many of the companies' operational functions will be integrated and centralized after the merger closes.

The merger involves Aquila's **selling, transferring, or otherwise disposing or encumbering the whole or any part of its franchise**, works or system, necessary or useful in the performance of its duties to the public, **by any means**, **direct or indirect**, **merge or consolidate such works or system, or franchises, or any part thereof, with *any* other corporation**, person or public utility, and as such, the transfer, sale, merger or consolidation of Aquila's assets requires that the companies involved secure Commission authorization.[884] No party contests the fact that the transactions proposed require Commission approval pursuant to Section 393.190.

b. Properly Pled Request for Relief

The Industrial Intervenors, Staff, and Public Counsel ("opposition parties") have argued that because the Applicants are not seeking a merger, combination, integration, either direct or indirect, between KCPL and Aquila, two companies subject to the jurisdiction of the Commission, that the Commission is barred from considering the benefits of the proposed transaction pursuant to the very standard, the "not detrimental

[883] See GPE/KCPL Exh. 37-39.
[884] Section 393.190.1 (emphasis added).

to the public interest" standard, they all agree applies to this transaction.[885] The opposition parties frame their argument as being a pleading defect on the part of the Applicants, and state that the scope of the proceeding is, necessarily, limited by the Application filed and the relief requested therein, which they allege does not encompass any of the benefits of the transaction as proposed.[886] However, as time has progressed in this matter, the ever-shifting sands surrounding the opposition parties' argument have revealed that it has not one, but three heads.[887]

The first variation of the opposition parties' argument is that the Applicants, by failing to specifically request approval or authority to integrate (or merge) KCPL and Aquila have forfeited consideration of the benefits of the proposed merger, because the benefits flow from the integration of KCPL and Aquila and not the merger of Aquila and Gregory Acquisition. Staff witness Schallenberg summarized this theory when he testified that Staff did not review the specifics of the expected synergies because Staff believes that synergies can only occur if a formal merger or consolidation of KCPL and Aquila occurs, which is something that the Applicants have not asked to do under Section 393.190.[888] Staff also argues that because it views the Joint Application as effectively seeking the merger or consolidation of Aquila and KCPL without requesting approval under the statute, any claimed synergies may be disregarded by the Commission without further analysis.[889]

The second variation of the argument is simply that it would be unlawful for the Commission to grant the Applicants' proposed merger

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[885] See EFIS Docket Number 440, Initial Brief of the Office of the Public Counsel; EFIS Docket Numbers 447 and 448, *Post-Hearing Brief of Industrial Intervenors*; EFIS Docket Number 461, *Staff's Post-Hearing Brief*.

[886] The Industrials in particular assert that they are not consenting to any argument, or evidence, that the Applicants have properly requested authority for the integration of KCPL and Aquila so that synergy savings flowing from that integration can be evaluated in this matter. Transcript, pp. 1264-1265, 1305-1309, 1426-1428, and 3107-3111. See also Section 536.063(3).

[887] See Transcript, pp. 1426-1427. The Commission notes that, prior to the resumption of the evidentiary hearing on April 21, 2008, the Commission specifically denied two motions in limine filed by the Industrial Intervenors raising these same arguments. See also Transcript, pp 99-102 (the Commission denied the Industrials' first motion from the bench); EFIS Docket Number 120, Opposition of Great Plains Energy, Inc. and Kansas City Power and Light Co. to Motion in Limine of Indicated Industrials, filed December 2, 2007; and EFIS Docket Number 286, Order Denying Second Motion in Limine of Industrial Intervenors, issued April 8, 2008.

[888] See Transcript, pp. 1820-23 and 1844-49.

[889] See Staff Exh. 100, Schallenberg Rebuttal and Staff Report, pp. 11-12 and 43-44.

because they have failed to request Commission approval of the integration of KCPL and Aquila.[890]

And finally, the third variation is that because the Applicants failed to request Commission authority to integrate KCPL and Aquila in their Application, the other parties lacked sufficient notice to prepare their opposition cases. Thus, this final variation generates the conclusion that consideration of synergies associated with the merger would be irrelevant and would be a violation of due process to the prejudice of the opposition parties for the Commission to consider the calculated synergies flowing from the merger.[891]

Despite the opposition parties' arguments, it is well established law that the technical rules of pleading are not applicable to applications or pleadings filed with the Commission.[892] "They are to be liberally construed."[893] Indeed, many Commission rules even allow for late-filing of required application materials, and the Commission frequently conditions its authorizations on the submission of additional documentation or on procedural or substantive requirements being fulfilled at a time following evidentiary hearings and final determinations.[894]

With regard to the first head of the opposition parties' argument, Section 393.190 does not require that the approval authority sought for a merger or transfer of assets be somehow restricted to any particular entities. The statute clearly states, **"with any other corporation."[895]** Section 393.120 states: "The provisions of section 386.020, RSMo, defining words, phrases and terms, shall apply to and determine the meaning of all such words, phrases or terms as used in sections 393.110 to 393.290," and Section 386.020(11) defines "corporation" simply as

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890 Transcript, pp. 3111-3112.

891 Transcript, pp. 3107-3112. See also Transcript, pp. 1264-1265, 1305-1309, 1426-1428, 1820-23 and 1844-49. See Post-Hearing Briefs of Staff, Public Counsel, and Industrial Intervenors. See EFIS Docket Number 112, *Motion in Limine of Indicated Industrials*, pp. 2-4, filed November 28, 2007; EFIS Docket Number 254, *Second Motion in Limine of Indicated Industrials*, pp. 2-5, filed March 13, 2008; EFIS Docket Numbers 447 and 448, Post-Hearing Brief of Industrial Intervenors, pp. 20-26, filed June 2, 2008. Staff did not join in the notice argument. Transcript, p. 3122.

892 *State ex rel. Crown Coach Co. v. Public Service Com'n*, 179 S.W.2d 123, 126 (Mo. App. 1944). See also *State ex rel. M., K. & T. R. Co. v. Public Service Com'n*, 210 S.W. 386 (Mo. 1919); *State ex rel. Kansas City Terminal R. Co. v. Public Service Com'n*, 272 S.W. 957 (Mo. 1925).

893 *Id*. See also Section 386.610.

894 See Commission Rules 4 CSR 240-3.110 and 3.115 as examples.

895 Section 393.190.1 (Emphasis added).

including "a corporation, company, association and joint stock association or company."

"Merge" and "consolidate" are not defined in Chapter 393, so the Commission must look to other sources for guidance. Under Missouri law any two "domestic corporations may merge into one of the corporations . . . ."[896] Similarly, any two "domestic corporations may consolidate in a new domestic corporation . . . ."[897] In order for a merger or consolidation to occur under Missouri corporate law, two entities must combine to form one entity.

No party to this matter disputes the facts that Aquila, Gregory, and Great Plains are all corporations and none are disputing the fact that the Applicants have sought approval of a merger. The merger is between a special purpose subsidiary of Great Plains Energy with Aquila, with Aquila being the surviving corporation. KCPL and Aquila are not merging or consolidating corporations. Both will remain separate entities with separate tariffs, separate rates, and separate generation and distribution assets.

Regardless of how the opposition parties characterize the transaction, Section 393.190 applies, Commission approval is required for the transaction to proceed, and the appropriate standard for evaluating the transaction is the "not detrimental to the public interest" standard. The statute places no restrictions on the application of the "not detrimental to the public interest standard." The statute does not prohibit the Commission from evaluating the benefits of the transaction based upon the structure of the transaction. It is irrelevant as to what part of the transaction that the benefits flow; any benefits of the transaction must be evaluated by the Commission.

Paragraph 34 of Joint Applicants' Application states that total pretax synergies for KCPL and Aquila are estimated to reach approximately $500 million over five years. This statement identifies the Applicants' intent to derive the synergies from the integration of KCPL and Aquila. Additionally, the "Wherefore" clause to the application cites all relevant statutes and Commission rules governing the proposed merger and subpart (K) of the clause requests that the Commission grant "such other relief as may be necessary and appropriate to accomplish the purposes of the Merger and this Joint Application, and to

[896] See Section 351.410.
[897] See Section 351.415.

consummate the Merger and related transactions in accordance with the Agreement and Plan of Merger and this Joint Application."

The Application incorporates by reference the prefiled testimony from Great Plains and KCPL's witnesses that fully outline the specifics of the transaction, including the integration of KCPL and Aquila's operations. The Application clearly identifies the transactions proposed, places all potential intervenors on notice as to what transactions are being contemplated and seeks the appropriate Commission authorizations for those proposed transactions.[898]

The opposition parties all argue that Section 393.190 governs this transaction, and they all argue that the appropriate standard to apply when evaluating the transaction is the "not detrimental to the public interest" standard, but they then inexplicably assert that the Commission must limit its evaluation of the transaction and the application of the standard.[899] The Applicants have properly pled and sought the appropriate authorizations pursuant to Section 393.190 to consummate the proposed merger. Thus, the Commission shall apply the appropriate standard to evaluate the transaction, which necessarily includes weighing all of the attendant benefits of the transaction.

[898] Staff admits they were preparing to litigate this case based upon a full understanding of the full relief requested by the Applicants and the associated attendant benefits, but became aware of this legal argument early in the proceedings and elected to pursue that as a matter of trial strategy. Transcript, Volume 23, pp. 3106-3125, see in particular pp. 3115 and 3126-3128. Public Counsel admitted the application was not deficient, in that the Commission can grant authorization for the merger requested, but maintains that the Commission cannot grant approval of the integration of KCPL and Aquila as part of that merger and maintains that the Commission cannot examine the benefits of the transaction. Transcript, pp. 3126-3127. The Industrials agreed with Public Counsel's assessment that the Application was not deficient, but that it failed to request the proper relief in order for the Commission to examine the synergy savings or benefits flowing from the merger. Transcript, p. 3126. EFIS Docket Numbers 447 and 448, Post-Hearing Brief of Industrial Intervenors, pp. 19-25, filed June 2, 2008.[898]

[899] The opposition parties' recitations of Section 393.190 imply that only a merger between Aquila and KCPL would allow the Commission to examine any benefits flowing from the merger. These parties chose this as one of their legal strategies in this matter and to the extent they chose not to address the alleged benefits of the transaction, that was their choice. The Commission did not in any way prejudice them or impinge upon their due process rights by allowing relevant evidence to be admitted in order to properly apply the "not detrimental to the public interest" standard. See EFIS Docket Number 112, *Motion in Limine of Indicated Industrials*, pp. 2-4, filed November 28, 2007; EFIS Docket Number 254, *Second Motion in Limine of Indicated Industrials*, pp. 2-5, filed March 13, 2008; EFIS Docket Numbers 447 and 448, Post-Hearing Brief of Industrial Intervenors, pp. 20-26, filed June 2, 2008; Transcript, pp. 1426-1428, 3107-3109, and 3112-3122.

Even assuming, *arguendo*, that the opposition parties are correct, which they are not, the Commission directs them to the conclusions of law section where the Commission performs its balancing test to determine if the Applicants met their burden of establishing that the proposed merger is "not detrimental to the public interest." Synergy savings are but one factor to be weighed, and even if the Commission was barred from evaluating the synergies (an evaluation that the Commission believes is appropriate and required under the law) the Commission could still find the proposed transactions satisfy the standard for approval.

3. Merger Approval Standard – "Not Detrimental to the Public Interest" – and Burden of Proof

No party contests that the appropriate standard the Commission must apply to evaluate the proposed transaction, pursuant to the application of Section 393.190, is the "not detrimental to the public interest" standard. The parties have each laid out descriptions of what they assert the application of this standard entails in their post-hearing briefs. The Commission looks to the relevant case law and prior Commission orders for guidance and concludes that the Missouri Supreme Court delineated this standard and prescribed its application for cases filed pursuant to Section 393.190 in *City of St. Louis v. Public Service Com'n of Missouri*, when it stated:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"[900]

[900] *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo banc 1934).

The Missouri Supreme Court based its determination on a review of Section 393.190's predecessor, Section 5195, RSMo 1929.[901] No Missouri court has deviated from that ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190.

Since 1934, other Missouri court decisions have touched upon this standard,[902] and the Commission summed up, most cogently and completely, the standard when it issued its Report and Order in the *AmerenCIPS* case.[903] The Commission summarized the standard and the burden of proof for such cases as follows:

> The Governing Standard under Section 393.190.1:
> Section 393.190.1 does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest." (Commission Rule 4 CSR 240-2.060(7)(D)). A court has said of Section 393.190.1, that "[t]he obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility." (*State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., 1980)). To that end, the Commission has previously considered such factors as the applicant's experience in

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[901] *Id*.

[902] As the Missouri Court of Appeals noted: "We have reviewed Chapter 386 RSMo. which delineates the general powers of the Commission and Chapter 393 RSMo. which deals specifically with the Commission's powers over public utilities including those furnishing sewage services. We have found no provision and Relator directs us to no provision that grants to the Commission the power to determine the interests of persons making claim to the proceeds of the sale of the assets of a utility. Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. § 393.190 RSMo. (1969). The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility. The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest. *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934)." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz* , 596 S.W.2d 466, 468 (Mo. App. 1980).

[903] *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108

the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently. (See In the Matter of the Joint Application of Missouri Gas Energy, et al., Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220). None of these factors are at issue in the present case; neither is UE's ability to continue to provide adequate service to its customers.

The parties do not agree on the interpretation or application of the "not detrimental to the public" standard. UE asserts that the Commission must grant approval unless it finds the transfer would be detrimental to the public interest. (*St. ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. banc 1934)). UE emphasizes the opinion of one court, quoted above, that the purpose of the statute is to ensure the continuation of adequate service to the public. (*Fee Fee Trunk Sewer*, supra). UE quotes prior decisions of this Commission to the effect that denial requires compelling evidence on the record that a public detriment is likely to occur. (In the Matter of KCP&L, Case No. EM-2001-464 (*Order Approving Stipulation & Agreement and Closing Case*, issued Aug. 2, 2001)). According to UE, while the Applicant has the burden of proof, those asserting a specific detriment have the burden of proof as to that allegation. (*Anchor Centre Partners, Ltd. v. Mercantile Bank, NA*, 803 S.W.2d 23, 30 (Mo. banc 1991); *In the Matter of Gateway Pipeline Co.*, Inc., Case No. GM-2001-585 (Report & Order, issued Oct. 9, 2001)). Finally, UE notes that the Applicant is not required to show that the transfer is beneficial to the public. (*In the Matter of Sho-Me Power Corp.*, Case No. EO-93-259 (Report & Order, issued Sep. 17, 1993)).

Staff points out that this is the Commission's first contested case under Section 393.190.1 since AG Processing, a decision in which the Missouri Supreme Court reversed a Commission decision under that

section. (*AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003)). That case held, Staff asserts, that the Commission must evaluate both the present and future impacts of a transfer at the time it makes its decision. Staff further contends that, while the 'not detrimental' standard applies to the transfer itself, UE seeks some additional relief that is governed by other, higher standards. For example, Staff argues that UE seeks several ratemaking determinations that are subject to the 'just and reasonable' standard and that UE seeks a waiver from the Commission's affiliate transaction rules governed by the 'best interests of the regulated customers' standard.

Public Counsel, in turn, agrees that Section 393.190.1 requires prior Commission authority for a utility to transfer any part of its system or assets; such authority is to be granted only where the proposed transfer is "not detrimental to the public interest." (*City of St. Louis*, *supra*). The applicant utility bears the burden of proof and, contrary to UE's notion, this burden does not shift. Public Counsel urges the Commission to ignore UE's quotations of erroneous language from past Commission orders that approval must be granted unless "compelling" evidence shows that a "direct and present" detriment is 'likely' to occur. Instead, as recently articulated by the Missouri Supreme Court in AG Processing, and restated by the Commission itself, (*In the Matter of Aquila, Inc*., Case No. EF-2003-0465 (Report & Order, issued Feb. 24, 2004, pp. 6-7)) "a detriment to the public interest includes a risk of harm to ratepayers." Thus, Public Counsel takes the position that the mere risk itself of higher rates in the future is a detriment to the public. Public Counsel insists that the law requires that the Commission deny the proposed transaction even if the detriments found are the result of events that would simply be set into motion or which involve the probability of significant harm which could likely occur, but is not certain to occur.

In the AG Processing case, the Commission approved an acquisition and merger by Aquila, Inc. -- then called

UtiliCorp -- that involved an acquisition premium of $92,000,000. (An acquisition premium is the amount by which the purchase price exceeds the book value of the assets purchased). Although the Commission rejected Aquila's proposed regulatory plan, under which a portion of the acquisition premium would be recovered in rates, the Commission refused to consider the recoupment of the acquisition premium on the grounds that it was a rate case issue. The Missouri Supreme Court reversed, saying:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium. (*AG Processing*, supra, 120 S.W.3d at 736 (internal footnotes omitted)).

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing “not detrimental to the public” standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in

evidence are considered. The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. Approval should be based upon a finding of no net detriment. Likewise, contrary to UE's position, the *AG Processing* decision does not allow the Commission to defer issues with ratemaking impact to the next rate case. Such issues are not irrelevant or moot because UE is under a temporary rate freeze; the effects of the transfer will still exist when the rate freeze ends.

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. **A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.**[904]

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift.

[904] Emphasis added.

> Thus, a failure of proof requires a finding against the applicant.[905]

Consequently, the Commission may not withhold its approval of the proposed transaction unless the Applicants fail in their burden to demonstrate that the transaction is not detrimental to the public interest, and detriment is determined by performing a balancing test where attendant benefits are weighed against direct or indirect effects of the transaction that would diminish the provision of safe or adequate of service or that would tend to make rates less just or less reasonable.[906]

4. Public Interest Defined

While the standard for evaluating transactions proposed pursuant to Section 393.190 is clear, the term "public interest" must also be examined. "The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public."[907] "[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation."[908] The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities.[909] The legislature delegated the task of determining the public interest in relation

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[905] Report and Order, *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, issued October 6, 2004, effective October 16, 2004. See also Report and Order on Rehearing, issued February 10, 2005, effective February 20, 2005, reiterating the standard, 2005 WL 433375 (Mo.P.S.C.) Re Union Electric Company, d/b/a AmerenUE. It should be noted that the Commission footnoted the relevant legal citations in its Report and Order and for purposes of completely referencing this excerpt of the Report and Order in this case those footnote citations were placed back in the text at the appropriate cite notations.

[906] *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz* , 596 S.W.2d 466, 468 (Mo. App. 1980).

[907] *In re Rahn's Estate*, 316 Mo. 492, 501, 291 S.W. 120, 123 (Mo. 1926).

[908] *Morrshead v. Railways Co.*, Mo. 121 165, 96 S.W. 261, 271 (Mo. banc 1907).

[909] *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission's authority.

The public interest is a matter of policy to be determined by the Commission.[910] It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.[911] Determining what is in the interest of the public is a balancing process.[912] In making such a determination, the total interests of the public served must be assessed.[913] This means that some of the public may suffer adverse consequences for the total public interest.[914] Individual rights are subservient to the rights of the public.[915] The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

5. Final Conclusions Regarding Jurisdiction, Applicable Statutes, Burden of Proof, and Applicable Standards for Evaluating the Merger Application

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) KCPL and Aquila are subject to the jurisdiction, control, and regulation of the Commission; (2) the Applicants have properly pled and requested all appropriate relief from the Commission with regard to their merger application pursuant to Section 393.190 and the Commission's Rules; (3) the standard to apply to evaluate the merger proposal is the "not detrimental to the public interest standard," and application of this standard is a balancing test as

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[910] *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

[911] *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

[912] *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993 , 1993 WL 719871 (Mo. P.S.C.).

[913] *Id*.

[914] *Id*.

[915] *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

described in detail, *supra*; (4) determination of what constitutes the "public interest" is a matter of policy to be determined by the Commission; and (5) the Applicants bear the burden of proof of satisfying the standard in order to gain approval of their proposed merger.

B. Conclusions of Law Regarding Projected Synergy Savings[916]

1. Total Synergies

Based upon the Commission's findings of fact, the total operational synergies projected to result from the proposed transaction are $305 million over the first 5-year period. The total synergies created through the first ten years are $755 million. On a Missouri jurisdictional basis, the total synergies are equal to $549 million for 10 years, with $222 million expected during the first 5 years. The individual breakdown for each category of synergy savings is extensively outlined in the Commission's Findings of Fact.

These synergy savings, if fully realized, will substantially exceed $90 million; the sum of the $47.2 million in Missouri Transaction Costs and $42.8 million in Missouri Transition Costs.[917] As testified to by Great Plains and KCPL witness Zabors, two areas of synergies alone nearly equal the expected Transaction and Transition Costs; those being $50 million of synergies related to employee reductions and an additional $30 million related to the sale and closing of the Aquila headquarters building.[918] Witness Zabors further testified that there is nothing speculative about these synergies, and they are in fact, "certain" and can be calculated "to the penny."[919] Moreover, as is further delineated below, the Commission determines that substantial evidence supports the conclusion that the majority, if not all of the projected synergy savings will be attained.

The Applicants have withdrawn their request for a "sharing proposal" through which synergy savings would be allocated on a 50%/50% basis between customers and shareholders. Instead, they propose to rely upon the natural regulatory lag that occurs between rate cases to retain any portion of synergy savings.[920] Because the Applicants do not seek recovery of Transaction or Transition Costs in

[916] Refer to Findings of Facts Numbers 164-322 for this section.
[917] Merger integration costs will be allocated as described by Mr. Giles in his Additional Supplemental Direct Testimony, Ex. 39 at 4-5, and by Mr. Tim Rush in his Supplemental Direct Testimony, Ex. 23 at 3-8.
[918] Transcript, p. 1417.
[919] Transcript, pp. 1410-1411.
[920] See GPE/KCPL Exh. 37, Bassham Add'l Supp. Direct Testimony, pp. 3-4.

rates unless the synergies achieved equal or exceed the level of such amortized costs, ratepayers are not subject to any risk regarding the recovery of these costs in rates.[921] The Commission notes that, while it will address the issue of recovering these costs in another section of this order, Public Counsel witness Dittmer admitted while being questioned by Commissioner Clayton that the Applicants' proposal regarding recovery of these costs is reasonable.[922]

2. Methods for Calculating Synergies

The methods the Applicants employed for developing the synergy estimates, and the support for ensuring their reliability, are extensively outlined in the Commission's Findings of Facts. The competent and substantial evidence indicates that the Applicants have taken care to separate synergies that may be achievable in their stand-alone capacities from the synergy savings that are unlocked by the merger.

There may be variations between projected and realized synergy savings post-merger, but this does not discredit the accuracy and reliability of the estimated calculations. Moreover, multiple witnesses testified as to the strong potential for recovery of even more synergies than were projected. In fact, some potential synergies were excluded from the projections in order to keep the estimates conservative. Witness Kemp, the most qualified expert reviewing the methods used to calculate synergies, testified that the level of hard, attributable benefits actually realized through merger transactions is typically in the range of 125 to 175 percent of the announced synergies.[923] Mr. Kemp further testified that in his considered opinion the level of synergy benefits that will ultimately be achieved through the merger will be substantially greater than KCPL's current synergy estimates. In addition, Joint dispatch of generation and transmission assets could add large benefits, once ISO issues are resolved. Also, due to the ability of competent utility management to find additional cost reductions or revenue enhancements as they dig deeper into the detail of integration planning, synergies tend to expand rather than contract.[924]

3. The Criticisms of the Applicants' Estimates of Synergies

As explained above, the Applicants have presented extensive, detailed testimony regarding the synergies and cost savings that are

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[921] Transcript, pp. 1310-1311.
[922] Transcript, p. 1730.
[923] GPE/KCPL Exh. 18, Kemp Supp. Direct, pp. 1-28.
[924] *Id*.

expected to result from the integration of the Aquila and KCPL operations. While Staff, Public Counsel and the Industrial Intervenors witnesses partially addressed the synergy savings issue in their testimony, as demonstrated in the Commission's Findings of Facts, the Commission concludes that none of these limited criticisms are valid or supported when evaluated in the light of the factual record and accepted regulatory policy principles. Even opposition witness Mr. Dittmer admitted that the transaction would result in substantial synergy savings.

The Commission further notes that even if the overall synergy savings were reduced by the amount of "enabled" synergies identified by Mr. Dittmer, the remaining synergy savings would nevertheless exceed the transaction and transition costs needed to complete the proposed transaction. However, the Commission concludes that Mr. Dittmer's attempt to distinguish these types of synergies, in the context of this case, was erroneous. Both the created and enabled synergies, as supported by the competent and substantial evidence in this case, are unlocked by the merger.[925]

4. Final Conclusions Regarding Projected Synergy Savings

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) the Applicants' methodology for calculating and evaluating estimated synergies is consistent with industry practice and is more detailed and better supported than most transactions; (2) the Applicants' methodology for calculating and evaluating estimated synergies is comprehensive, current, detailed, attributable, quality assured, and conservative; (3) the estimated synergies are modestly above the industry average, but the facts of this case support the higher estimates; and (4) the Applicants' estimates of synergies are reasonable on a stand-alone basis and are in the range that would be expected on the basis of comparable transactions in the utility industry, and specifically with regard to the circumstances of integrating KCPL's and Aquila's operations.

The Commission further determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) the projected synergies are accurate, realistic and achievable at a very high level of confidence and probability; (2) the synergies actually realized from the merger have a very high probability of exceeding the

[925] As correctly noted by witness Zabors, it also makes no difference to the ratepayer how a realized synergy is labeled when that savings is passed through to the ratepayer. Transcript, pp. 1415-1416.

Applicants' estimates; (3) the synergies exceed transaction and transition costs and the method proposed for recovery of transaction and transition costs does not place the ratepayers at risk (the Commission will address transaction and transition cost recovery in a separate section of this order); (4) because the Applicants have agreed to recover any merger savings through "regulatory lag" as part of the traditional ratemaking process there is no net detriment to customers; and (5) the resulting synergies from the operational integration of KCPL and Aquila will afford substantial benefits to the companies' customers.

These conclusions weigh in favor of approving the transaction, and the Commission concludes that the achievable synergies projected weigh as a benefit of the proposed merger and will be balanced against any factor tending to pose a detriment of any kind to the public interest.

C. Conclusions of Law Regarding Transaction and Transition Cost Recovery[926]

The Applicants have requested that the Commission authorize the recovery of the transaction and transition costs associated with the merger by amortizing them over a five-year period. This period would begin with the first rate cases post-transaction for Aquila and KCPL subject to "true up" of actual transition and transaction costs in future cases. These costs, after the merger proposal was revised, total: $64.9 million in transaction costs, of which $47.2 million is Missouri jurisdictional; and $58.9 million in transition costs, of which $42.8 million is Missouri jurisdictional. There is no credible evidence in the record that the calculation of these amounts is inaccurate or unreasonable.

1. Transaction Costs

Staff, Public Counsel, and the Industrials have opposed recovery of the transaction costs, arguing that such costs should be borne by the shareholders. No party has opposed the recovery of transition costs.

Public Counsel's witness, Mr. Dittmer, testified that the intent of protecting ratepayers from providing unreasonable returns to utilities would be circumvented if rates were developed by considering a return on investments above net depreciated original costs.[927] This concept has been described as being the net original cost rule and the Commission has more fully articulated this rule as follows:

> As a general rule, only the original cost of utility plant to the first owner devoting the property to public service,

[926] Refer to Findings of Facts Numbers 323-359 for this section.
[927] OPC Exh. 200, Dittmer Rebuttal, pp. 42-45.

> adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule. The net original cost rule was developed in order to protect ratepayers from having to pay higher rates simply because ownership of utility plant has changed, without any actual change in the usefulness of the plant. If a utility were allowed to revalue its assets each time they changed hands, it could artificially inflate its rate base by selling and repurchasing assets at a higher cost, while recovering those costs from its ratepayers. Thus, ratepayers would be required to pay for the same utility plant over and over again. The sale of assets to artificially inflate rate base was an abuse that was prevalent in the 1920s and 1930s and such abuses could still occur.[928]

Great Plains is either paying outright or reimbursing KCPL for any transaction costs associated with the merger. Consequently, the Commission concludes that, in this instance, establishing a mechanism to allow recovery of the transaction costs of the merger would have the same effect of artificially inflating rate base in the same way as allowing recovery of an acquisition premium. This would result in an increase in rates to ratepayers that would exceed what would otherwise be the case.

2. Transition Cost Recovery

The transition costs quantified by the Applicants will be incurred to integrate Aquila and KCPL operations. Without incurring these costs, the companies could not achieve the estimated synergies, while maintaining or improving system reliability for Aquila's and KCPL's customers. These costs include third-party expenses to support the integration from legal, human resources, information technology, and other process perspectives. No party has opposed the deferral and amortization of transition costs in this proceeding, and as noted earlier, there is no credible evidence in the record to establish that the transition costs as calculated are in any way inaccurate or unreasonable. Moreover, the Applicants will not seek recovery of transition costs if

[928] Case Number EM-2000-292, Second Report and Order, In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company for Authority to Merge St. Joseph Light & Power Company with and into UtiliCorp United Inc., and, in Connection Therewith, Certain Other Related Transactions, 12 Mo.P.S.C.3d 388, 389-90 (2004), effective March 7, 2004.

insufficient synergy savings are realized to cover those costs.[929] Consequently, the Commission will allow recovery of transition costs.

3. Final Conclusions Regarding Transaction and Transition Cost Recovery

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) the Applicants' calculation of transaction and transition costs are accurate and reasonable; (2) in this instance, establishing a mechanism to allow recovery of the transaction costs of the merger would have the same effect of artificially inflating rate base in the same way as allowing recovery of an acquisition premium; and (3) the uncontested recovery of transition costs is appropriate and justified. The Commission further concludes that it is not a detriment to the public interest to deny recovery of the transaction costs associated with the merger and not a detriment to the public interest to allow recovery of transition costs of the merger.

If the Commission determines that it will approve the merger when it performs its balancing test (in a later section in this Report and Order), the Commission will authorize KCPL and Aquila to defer transition costs to be amortized over five years.[930]

D. Conclusions of Law Regarding Post-Merger Credit-Worthiness[931]

As an initial matter, the Commission takes note of the Missouri Supreme Court's decision in *State ex rel. AG Processing, Inc. v. Public Service Com'n*,[932] where the Court held that post-merger credit ratings are not a determinate factor when the Commission evaluates a merger proposal.[933] The Court held that even if a company's cost of debt increased post-merger, and even if a company's credit rating would be lowered as a result, that this "is just one factor for the Commission to weigh when deciding whether or not to approve the merger."[934] In noting this fact, the Commission does not diminish the importance of this factor,

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[929] Transcript, pp. 1310-1311.
[930] The Commission will give consideration to their recovery in future rate cases making an evaluation as to their reasonableness and prudence. At that time, the Commission will expect that KCPL and Aquila demonstrate that the synergy savings exceed the level of the amortized transition costs included in the test year cost of service expenses in future rate cases.
[931] Refer to Findings of Facts Numbers 359-464 for this section.
[932] 120 S.W.3d 732 (Mo. banc 2003).
[933] *State ex rel. AG Processing, Inc. v. Public Service Com'n*, 120 S.W.3d 732, 736-737 (Mo. banc 2003).
[934] *Id*.

but merely makes this observation to emphasize that this is but one factor to be weighed in the application of the "not detrimental to the public interest" standard that the Commission is obligated to apply.

1. Credit Rating Agencies

As demonstrated by the Commission's Findings of Facts on this issue, the Applicants adduced a significant amount of evidence regarding their current and projected post-merger credit ratings. S&P's and Moody's projected ratings were based upon assumptions related to the merger proposal, some of which changed during the course of this proceeding. The most recent projections from the rating agencies were issued in January 2008, and the agencies did not have a full picture of the revised merger proposal. However, the changes in the key assumptions cannot be regarded as tipping the scales toward a downgrade. For example, Great Plains sold its unregulated subsidiary Strategic Energy for $305 million in cash. Given that the credit rating agencies had assumed a lower sales price of $250 million in their January evaluation of the Applicants' revised regulatory requests, the sale of Strategic Energy provides more financial flexibility. The assumed lower sales price also confirms the conservative nature of the advisory opinions of the credit rating agencies that Great Plains' acquisition of Aquila will not adversely affect the credit ratings of Great Plains or KCPL.

During the hearings, Mr. Bassham testified that he was "very confident" that the credit ratings of KCPL and Great Plains "would remain consistent with the information we discussed with Moody's and Standard & Poor's" earlier in 2008.[935] Both Great Plains Chairman Michael Chesser and KCPL Treasurer Cline believed that a change in the credit ratings would not occur.[936] Although Moody's had recently placed the companies on a negative outlook, Mr. Bassham explained that this was not a downgrade, but rather an indication of concern as a "result of the [Applicants'] revised [merger] request" and "the fact that we had agreed to absorb [Aquila's] interest costs [which] would cause there to be less flexibility …."[937] Mr. Bassham stated: "I wouldn't say [a downgrade is] likely" by Moody's, particularly since its credit rating of Baa2 "is one notch above Standard & Poor's."[938]

Given that credit ratings aren't normally changed because of a single event and that multiple factors are included in a rating agency's

[935] Transcript, p. 2139.
[936] Transcript, pp. 2539-40 (Chesser); Transcript, p. 2585 (Cline).
[937] Transcript, pp. 2321-22.
[938] Transcript, pp. 2322-23.

review, Mr. Bassham concluded that under the Applicants' revised regulatory requests, "with all the work we've done, we don't see the merger in and of itself causing a downgrade."[939]

Staff, Public Counsel, and the Industrials all challenged the Applicants' assertions that they can maintain their credit-worthiness. These parties primarily base their arguments on the fact that certain key assumptions the rating agencies used (as fully delineated the Findings of Fact) have changed and an assertion of cost and schedule delays with current construction projects will negatively affect credit-worthiness. The problem with these opposition arguments is that they are totally speculative in nature and lack any credible factual support.

2. Cost and Schedule of the Iatan Construction Projects

Mr. Bassham testified that the cost and schedule estimates for Iatan 1 and 2 compiled at the end of April did not present undue risk to Great Plains and KCPL, and that the companies possessed sufficient financial flexibility to consummate the merger and carry out the projects.[940] The public statements issued by Great Plains and KCPL on May 7, 2008, disclosed that while overall projected costs rose by 19%, Iatan 1 will experience a delay of only 47 days to February 1, 2009, and Iatan 2 remains on schedule to be completed in the summer of 2010.[941] KCPL's share of the cost of the Iatan 1 environmental retrofits increased from the previous range estimate of $255-264 million to $330-350 million, a 33% rise from the top end of the prior estimate.[942] The mid-point estimate is a 28% increase.[943] The cost estimate for Iatan 2 experienced a mid-point increase of 10%, from the control budget estimate of $1.685 billion to $1.861 billion.[944] KCPL's approximately 55% share of Iatan 2 has increased from the previous 2006 range of $837-914 million to a range of $994 million to $1.050 billion, with the top end of the range representing a 15% increase.[945]

As KCPL President William H. Downey testified, these increases in costs and minor delays in schedule are the product of an "extraordinary period" of labor and construction industry issues. The

[939] Transcript, p. 2324.
[940] Transcript, pp. 2380-84.
[941] GPE/KCPL Exh. 305 at pp. 2-3 (Form 8-K); Transcript, pp. 2380-81.
[942] See GPE/KCPL Exh. 305 at p. 3.
[943] Transcript, p. 2381.
[944] Transcript, pp. 2380-81.
[945] GPE/KCPL Exh. 305 at p. 2 (Form 8-K)

electric utility industry, not just in the United States, but worldwide, is in a building mode, which has increased demand not only for the sophisticated equipment needed to build power plants, but also labor.[946] Inflation is on the rise, and the value of the U.S. Dollar has fallen.[947] Chairman of the Board Michael Chesser advised the Commission that even in light of these economic trends, he believed that Great Plains and KCPL would remain financially strong post-merger and that, based on discussions with rating agencies, a credit downgrade was "very unlikely."[948] Mr. Chesser noted that with Aquila's debt being reduced, additional assets being placed in rate base, "significant growth" in Aquila's service area, and the sale of Strategic Energy, the rating agencies are viewing Great Plains "as a pretty positive story."[949] Mr. Michael Cline, KCPL's treasurer, echoed these sentiments, stating that the results of the reforecast were not likely to have a negative effect, which they have not had to date.[950]

KCPL witnesses involved in the Iatan construction projects emphasized the utility's efforts to keep a strict account of cost issues through an evaluation of risks and opportunities through what are known as "R&O Tables," as well as a comprehensive reforecast process.[951] KCPL has recruited highly qualified individuals to manage those projects and retained competent outside experts to review the decisions being made.[952] KCPL witnesses Foster and Davis testified that their full attention is devoted to the Iatan projects, that they are not involved with the acquisition of Aquila or related credit-worthiness issues, and that they do not serve as members of any merger integration team.[953] Finally, a new vice president of construction has been hired to manage the

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[946] Transcript, pp. 2479-2481 and 2484; Ex. 305 at 2.
[947] *Id*.
[948] Transcript, pp. 2528 and 2539-2540.
[949] Transcript, pp. 2539-2540.
[950] Transcript, p. 2585.
[951] See generally, Transcript, pp. 2467-84; Transcript, pp. 2715-28; Transcript, pp. 2756-62.
[952] *Id*. Terry Foster, Director of Project Controls at Iatan, has spent over 40 years in the electric utility industry. Transcript, p. 2755. In the last ten years he worked for Fluor Daniel as the project director for a standalone project with Carolina Power & Light, was director of project controls for all capital projects at American Electric Power Co., and was the regional quality control manager for projects overseen by Black & Veatch.
See Transcript, p. 2755. Brent Davis, now Iatan 1 Project Director, has worked on Iatan 1 and 2 projects since June 2006. Transcript, pp. 2713-14. He has worked for KCPL since 1980 at all four of its coal-fired power plants, and most recently served as plant manager at Hawthorn 5. Transcript, pp. 2713-14.
[953] Transcript, pp. 2746-47 and 2752; Transcript, pp. 2754 and 2799-2800.

construction projects evidencing Great Plains and KCPL continued managerial oversight of the projects.[954]

No qualified expert was offered by any other party to contradict any of these witnesses. In fact, not one witness testified that the proposed acquisition of Aquila endangered the CEP construction projects or the financial well-being of KCPL, or that the CEP could not be carried out as the acquisition of Aquila proceeds. Staff, Public Counsel, and the Industrials adduced no credible evidence that the changes in cost and completion schedule of the Iatan infrastructure projects: (1) were out of line with current industry standards and current economic trends; (2) were being mismanaged or that imprudent expenditures had been incurred; or (3) that the companies' contingency plans were in any way inadequate. Nor did the opposition parties provide any credible evidence to establish that the infrastructure projects of the CEP posed an unreasonable risk to the merger or, conversely, that the merger posed an unreasonable risk to the CEP projects, such that the merger would detrimental to the public interest. The unequivocal evidence presented at the hearing was that the CEP projects neither threaten the merger, nor are threatened by the merger such that the proposed transaction should be disapproved.

3. Conclusions Concerning the "Crane Incident"

As demonstrated by the record in this matter, there is no credible evidence that the crane accident that occurred at the Iatan construction site on May 23, 2008, will have any significant effect on the cost and schedule for the completion of the Iatan construction projects. There is no credible evidence that Applicants' recovery and contingency planning will be in any way inadequate to address this incident. There is no credible evidence that the crane incident will have any effect on KCPL's or Aquila's credit ratings.

4. Conclusions of Law Regarding Additional Amortization[955]

The Applicants have no request pending before the Commission with regard to a future Aquila regulatory plan. As Mr. Bassham explained to Commissioner Clayton, while the Applicants are not asking for a specific regulatory amortization treatment in this case, "we would like . . . to work with the parties to develop a plan similar

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[954] Transcript, pp. 2487-89 and 2708.

[955] Refer to Findings of Facts Numbers 359-464, in particular Numbers 459-460 for this section. See also procedural history section concerning the evidentiary ruling on April 24, 2008.

to what we did with KCPL. Assuming we're not able to achieve that, we might propose our own plan in the first rate case."[956] As described in the procedural history section of this Report and Order, because the Applicants' withdrew their original request for a regulatory plan involving Additional Amortizations the Regulatory Law Judge properly ruled that any evidence relating to the Additional Amortizations was irrelevant to this proceeding.

An offer of proof was accepted on this issue from the Industrial Intervenors at the end of the case, and testimony was received from witnesses Cline, Schallenberg and Trippensee on the issue of Additional Amortizations. Testimony from both Michael Cline, the treasurer of Great Plains and KCPL, and Staff's Robert Schallenberg confirmed that any cash flow from Additional Amortizations was "fungible," and not specifically separated out or directed to specific capital investments or other utility projects.[957] Public Counsel's witness Russell Trippensee also testified that "[t]here's no tracing of debt to specific investments at all."[958] He stated that when the ratios and formula are in place and after the Commission sets rates on a traditional basis in a future rate case, only then would the Additional Amortization process be used "to reflect the additional cash flow necessary to meet . . . that ratio target that was set out in the plan . . . ."[959]

The Industrials never moved the Commission to reconsider its evidentiary ruling following the offer of proof. The Commission concludes that the offer of proof made clear that in the absence of a specific proposal containing a variety of financial metrics and other considerations, there was no way to predict what effect a future regulatory plan containing Additional Amortizations would have on either Aquila, Great Plains, or KCPL.

For purposes of its Conclusions of Law section on this issue, the Commission makes clear that in addition to the reasons articulated in this section it is adopting the reasoning delineated in detail in the Procedural History section of this Order regarding the relevancy of this issue. The Commission made the determination that this issue was not

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[956] GPE/KCPL Exh. 37, Bassham Add'l Supp. Direct, p. 4; Transcript, pp. 1312-1313.
[957] Transcript, pp. 2956 and 2958 (Cline); and pp. 2994-2997 (Schallenberg).
[958] Transcript, pp. 2967-68. See also Findings of Fact Numbers 31 and 44-49 regarding the credibility of witness Trippensee and the limits of the relevance of his pre-filed testimony.
[959] Transcript, p. 2978.

relevant in its April 24, 2008 evidentiary ruling.[960] The Commission concludes that any issues relating to the Additional Amortization proposal originally made by the Applicants for use by Aquila are not relevant to whether the merger should now be approved by the Commission and no Commission decision is required on Additional Amortizations in this proceeding.

5. Conclusions of Law Regarding Actual Debt Cost Recovery[961]

The Applicants have withdrawn their request that the Commission permit recovery of Aquila's actual debt interest costs in a future rate case. Instead, they propose to follow the debt cost recovery procedure that the Commission used in Aquila's recent Missouri rate cases.[962] Because the Applicants have withdrawn their request for recovery of the actual interest costs of Aquila, the Commission will not address this issue in this proceeding. The Commission will review the proper ratemaking treatment of Aquila interest costs in future Aquila rate cases. With regard to this proceeding, there is no credible evidence in the record that this alternative proposal would negatively affect the credit-worthiness of KCPL or Aquila and no evidence that approval of the merger utilizing this alternative proposal would be detrimental to the public interest.

6. Final Conclusions Regarding Post-Merger Credit-Worthiness

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) there is no conclusive, competent evidence that there would be either an upgrade or downgrade in the current credit ratings of Great Plains, KCPL, or Aquila in relation to approval of the proposed merger; (2) KCPL's Comprehensive Energy Plan does not affect Great Plains' financial ability to acquire Aquila in a manner that is detrimental to the public interest; (3) the current cost estimates and schedule of the Iatan construction projects are not related to the merger, do not affect the credit-worthiness of Great Plains, KCPL, or Aquila and do not cause the merger to be detrimental to the public interest; (4) the crane incident

[960] See the Procedural History Section. See also Transcript, pp. 2073-2120 - see p. 2096, in particular.
[961] Refer to Findings of Facts Numbers 359-464, in particular Number 460-464 for this section.
[962] GPE/KCPL Exh. 37, Bassham Add'l Supp. Direct, p. 2; GPE/KCPL Exh. 38, Cline Add'l Supp. Direct, pp. 1-4.

occurring on May 23, 2008, did not significantly affect the current cost estimates and schedule of the Iatan construction projects and no evidence supports a conclusion that the accident would have a negative effect on the credit-worthiness of the Applicants post-merger; (5) there is no regulatory plan involving Additional Amortizations and no proposal for actual debt cost recovery before the Commission to consider in this matter, and consequently, these non-existent plans have no bearing on the credit-worthiness of Great Plains, KCPL, or Aquila pre- or post-merger (assuming the merger is approved); and, (6) there is no credible evidence in the record that approval of a merger with the Applicants alternative proposal for debt cost recovery would negatively affect the credit-worthiness of Great Plains, KCPL, or Aquila.

These conclusions, however, do not fully alleviate the Commission's concerns with regard to the companies' post-merger credit-worthiness because of the speculative nature of predicting the Applicants' post-merger credit ratings. Some key assumptions utilized by the credit-rating agencies when evaluating the effect of the merger changed when the merger proposal were revised. Consequently, if the Commission determines that it will approve the merger after performing its balancing test, it will condition the merger on a requirement that the shareholders of Great Plains and KCPL bear the burden of any downgrading in their credit ratings post-merger.

E. Conclusions of Law Regarding Service Quality and Customer Service[963]

In order to ensure that service quality and customer service will not be adversely affected by the integration of customer service functions of Aquila and KCPL, KCPL undertook an extensive analysis of both companies' management structure, work practices, technology use, and field workforce.[964] KCPL Vice President of Customer Operations William Herdegen explained KCPL's process and future steps to ensure that customer service and reliability will not deteriorate after the close of the transaction. The strategy is to adopt the KCPL organization design to minimize change as much as possible for combining the two companies' customer service functions. Teams were formed with experts from each utility, using KCPL's customer service organization as the baseline.[965] All work was accounted for at Aquila and properly mapped into the KCPL organization.

[963] Refer to Findings of Facts Numbers 465-567 for this entire section.
[964] GPE Exh. 17, Herdegen Supp. Direct, p. 15.
[965] *Id*. at p. 17.

1. Customer Service

As a result of integration team analysis, 124 incremental positions will be added to KCPL's customer service team after the transaction is completed.[966] This number represents the sum of the allocation from Aquila's Central Service team assigned to its Missouri electrical properties, plus the direct cost areas of meter reading, customer service personnel, and the customer relations team.[967] Given the potential for additional customer questions during the year following the merger, an additional 42 employees will be made available by KCPL on Day One in the Customer Service area to respond to these expected inquires and ensure that service levels stay at their current levels.[968]

KCPL's Vice President of Information Technology, Charles Tickles, testified that Great Plains and KCPL have taken the proper steps to ensure that the integration of the companies' IT systems will be transparent to the external customer and will have minimal effect on the internal users of IT services.[969] The integration will provide a seamless customer experience for KCPL and Aquila customers, and will allow for separate tracking and reporting of customer financial and operational support data for both companies. In order to minimize disruptions, both the Aquila and KCPL customer information systems will remain in place on Day One post-closing until they can be integrated into one system.[970]

While Great Plains and KCPL expect to reduce employee levels as a result of the transaction, it is important to note that all of the distribution and customer service collective bargaining unit employees will be employed by KCPL on Day One. The majority of the reductions in the distribution and customer service areas are from reductions in redundant administrative/clerical positions or middle and senior management.[971]

Although the number of customer service centers will be reduced from eleven to six, each district will have satellite offices so that service representatives will be employed throughout the rural areas of the utilities' respective service territories.[972] None of the nine service centers

[966] *Id*. at p. 18.
[967] *Id*. at p. 17.
[968] Transcript, p. 2295.
[969] See Finding of Fact Number 237; GPE/KCPL Exh. 27, Tickles Supp. Direct, p. 3.
[970] Transcript, p. 2220.
[971] Transcript, p. 2297.
[972] Transcript, p. 2219; GPE/KCPL Exh. 17, Herdegen Supp. Direct, p. 11.

in the more rural areas (St. Joseph, Maryville, Trenton, Henrietta, Marshall, Sedalia, Warrensburg, Clinton and Nevada) will be closed.[973] Rural areas will continue to be served by local utility workers who will take their trucks home to respond to problems where they live.[974] Service levels will operate at the same or higher levels due to a greater depth of resources at the larger service centers.[975]

2. Service Quality

Two factors influencing service quality are tree trimming and meter reading. Witness Herdegen testified that by using KCPL's experience and best work practices, Aquila's incremental spending on tree trimming can be reduced by about 30 percent or approximately $2 million per year.[976] Even though the amount of spending will be reduced, the amount of tree trimming performed at Aquila will be maintained due to the adoption of KCPL's vegetation management practices that improve the reliability of the circuit, instead of encouraging contractors to trim trees, whether or not it is needed.[977]

If the Commission approves the merger, KCPL plans to expand its AMR into Aquila's urban areas.[978] There is a significant amount of capital involved in the AMR project;[979] however, expected synergy savings for the project in terms of labor and other savings are approximately $4.7 million.[980] The AMR project will also bring about improvements in service quality since AMR will allow enhanced meter reading capabilities and increase the level of program offerings to customers.[981]

Aquila facilities will be managed through the KCPL OMS, which tracks outage information at a more detailed customer and circuit level than Aquila currently does.[982] Using the OMS on Aquila's system provides for better system monitoring and event management at the circuit and customer levels, so that targeted reliability improvements can be made and long-term asset management programs can be

[973] GPE/KCPL Exh. 17, Herdegen Supp. Direct, p. 12.
[974] Transcript, p. 2270.
[975] Transcript, p. 2217.
[976] Transcript, p. 2287.
[977] Transcript, p. 2288.
[978] Transcript, p. 2281.
[979] Transcript, p. 2282.
[980] Transcript, p. 2289.
[981] GPE/KCPL Exh. 16, Herdegen Direct, p. 11. GPE/KCPL Exh. 17, Herdegen Supp. Direct, p 6.
[982] GPE/KCPL Exh. 17, Herdegen Supp. Direct, p. 15.

identified.[983] KCPL will also expand its Outage Reporting System ("ORS") so that Aquila's outage performance can be monitored. The ORS system permits early tactical decisions that will allow quicker recovery from major storms.[984]

KCPL has also agreed with Staff's recommendation concerning the frequency of customer service performance reviews by Staff to ensure that service will continue at current levels.[985] KCPL will maintain reliability benchmarking data based on rate jurisdiction so that Staff can monitor both Aquila and KCPL reliability benchmarks.[986]

3. Controverting Evidence

There is virtually no competent evidence to controvert the Applicants' extensive approach to ensure the service quality of its operations post-merger. Staff, in its Report,[987] references customer service issues following the acquisition of a Missouri natural gas local distribution company by a Texas utility almost 15 years ago and presents no analysis of how problems in that transaction are likely to be encountered by KCPL and Aquila, other than to note that workforce reductions and high turnover were factors encountered by the gas utility.[988] The evidence in this case, however, demonstrates that Great Plains and KCPL will add permanent and temporary employees to the customer service team and have prepared for integration of Aquila and KCPL operations through the adoption of the best practices of both utilities.

4. Final Conclusions Regarding Service Quality and Customer Service

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) Great Plains has taken adequate measures to ensure that the service quality of KCPL and Aquila post-merger will be maintained and even enhanced; (2) if the merger is approved, as the integration of systems progresses, services to both Aquila and KCPL customers should improve with new expanded services and options that include the best both companies have to offer; (3) KCPL's distribution program is based on a set of clearly defined strategies, specifications, and guidelines using a

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[983] *Id.*
[984] *Id.*
[985] Transcript, p. 2311.
[986] Transcript, p. 2303.
[987] See Findings of Fact Numbers 70-93 regarding the credibility of Staff's Report.
[988] Staff Exh. 100, Schallenberg Direct, attached Report, p. 72.

systematic preventive maintenance approach focused on maintaining high reliability while controlling costs; and (4) KCPL has an asset management portfolio of distribution maintenance and reliability programs that have produced reliable electric service. The Commission further determines that substantial and competent evidence in the record as a whole supports the conclusions that the integration of KCPL and Aquila operations will result in synergy savings that will maintain or improve service levels.

The Commission is confident that KCPL's identified day-to-day operational processes combined with the expanded use of technologies and asset management programs will drive the company toward improved electric service reliability as well as lower per-unit costs to install, operate, and maintain distribution assets. The Commission is also confident that the proper performance monitoring will ensure customer service levels will be maintained and eventually improved, and if the Commission ultimately determines that it will approve the merger it will impose the condition that KCPL comply with a service monitoring program, providing quarterly reports of monthly service quality data.

These conclusions weigh in favor of approving the transaction, and the Commission concludes that Great Plains and KCPL's approach to maintaining and improving service quality weighs as a benefit of the proposed merger and will be balanced against any factor tending to pose a detriment of any kind to the public interest.

F. Conclusions of Law Regarding the Application of the "Not Detrimental to the Public Interest" Standard – Application of the Balancing Test[989]

The substantial and competent evidence on the record as a whole demonstrates that Applicants' revised merger proposal offers greater protection and more benefits to ratepayers than their original proposal. There is long-term advantage in Aquila becoming an operating subsidiary of Great Plains in coordination with KCPL. Operational efficiencies and significant realized synergies will result in rates over time rising less than they would have otherwise. This will occur because the geographical service territories of the utilities are adjacent, therefore increasing the potential for economies of scale and improved reliability.

1. Operational Benefits

From a Transmission & Distribution perspective, consolidating adjacent operations will enable the two companies to more efficiently

[989] See Findings of Fact 1-567 for this section.

cover the same area. The newly combined companies will: (1) serve a combined metropolitan customer base of over 625,000 – an increase of almost 40% for KCPL today - and over 170,000 rural customers; (2) will have a generating capacity of approximately 5,800 megawatts; and (3) will be comprised of 21,770 distribution primary circuit miles over approximately 18,000 square miles. Applying KCPL's expertise in managing urban areas and Aquila's experience in managing rural areas will contribute to improved long-term performance. Transmission assets are also adjacent, with some substation assets jointly owned. An integrated customer service function will build upon the performance improvements that have been demonstrated by both companies.

From an energy supply perspective, the merger will provide greater scale and enable both companies to benefit from the processes and skills of each other. Increasing efficiency and availability of generation assets delivers significant financial and environmental benefits and reduces customers' exposure to the volatility of the regional power market. The companies are currently joint owners of Iatan 1 and 2, so the combination will simplify this structure.[990] Scale advantages and process improvements will also apply to support functions, where the combination will enable reduction of many overlapping positions.

Facility consolidation and rationalization across the service area reduces costs for customers and supports integrated response. The reduction of duplicate facilities – including headquarters and data center operations that neither party could do alone –reduces operating expenses and rate base. Facility consolidation is also a component of supply chain management synergies, which are significant. These include sourcing, materials management, fleet, and contract management.[991]

Many of the benefits that will flow to KCPL and Aquila customers come from integrating various KCPL and Aquila functions and activities. Realizing synergy savings is clearly a purpose of the merger, and integrated operations are clearly necessary and appropriate to accomplish that purpose. Because of the way the merger proposal is structured, the Applicants do not believe that a joint operating agreement is required because they believe the Cost Accounting Manual system of

[990] GPE/KCPL Exh. 21, Marshall Supp. Direct, pp. 1-22.
[991] *Id*.

accounting adequately addresses the Commission's regulatory requirements.[992] During the hearing, Mr. Giles explained:

> **Mr. Riggins:** Mr. Giles, in response to a question from Mr. Dottheim, I think you agreed with him or you made the statement that -- pardon me. You didn't agree with him, but you made the statement that we don't need an operating agreement. Could you explain why in your view we don't need an operating agreement?
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> **Mr. Giles:** Yes. Both Aquila and KCPL will, in whatever ultimately Aquila's name is changed to, will be owned 100 by GPE, Great Plains Energy, and Aquila will no longer exist as Aquila. The key to integrating the operations of these two companies is to make sure we track the costs, make sure we allocate the costs properly on the accounting and for regulatory purposes because we will continue to maintain separate rate schedules, separate assets, separate books. So the key is the cost allocation system, and we will have a cost allocation manual that will set all of that detail out as to how we operate the two companies and maintain this separate distinction for both accounting and financial reporting and for regulatory purposes. You don't need an operating agreement to do that because Bill Downey, as I said, will be president and CEO of both of these companies, and I find it hard to picture Bill Downy signing an operating agreement with Bill Downey.
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> **Mr. Riggins:** Does KCPL currently have a cost allocation manual that it utilizes to allocate costs to different entities?
>
> **Mr. Giles:** Yes, we do.

Despite the Applicants' belief that a joint operators agreement is not required, Great Plains and KCPL have offered to execute and file a joint operators agreement if the Commission decides that one is required.[993]

The Commission believes that the operational integration of KCPL and Aquila will produce substantial benefits for their respective customers, and to ensure a seamless operation and the flow of those benefits the Commission determines that a condition of the merger, if it is

[992] Transcript, pp. 1497-1498.
[993] GPE/KCPL Exh. 39, Giles Additional Supp. Direct, p. 3; Transcript, pp. 1893.

approved, should be a requirement that the KCPL and Aquila execute file a joint operators agreement with the Commission.[994]

2. Synergy Savings and Transaction and Transition Costs

The total operational synergies that will result from the proposed transaction are $305 million over the first 5-year period. However, the merger is expected to produce substantially more savings to customers. The total synergies created would total $755 million through year 10. On a Missouri jurisdictional basis, the total synergies are equal to $549 million for 10 years, with $222 million expected during the first 5 years. These will substantially exceed $90 million, the sum of the $47.2 million in Missouri Transaction Costs and $42.8 million in Missouri Transition Costs. In fact, two areas of synergies alone nearly equal the expected Transaction and Transition Costs. Great Plains and KCPL witness Zabors testified that there was approximately $50 million of synergies related to employee reductions and an additional $30 million related to the sale and closing of the Aquila headquarters building – savings that were certain. The Applicants will not seek recovery of Transaction or Transition Costs in rates unless the synergies achieved equal or exceed the level of such amortized costs. Consequently, ratepayers are not subject to any risk regarding the recovery of these costs in rates. Moreover, as the Commission has already determined, if it approves the merger it will disallow the recovery of Transaction Costs creating additional savings for the ratepayers.

3. Credit-Worthiness

There is no credible evidence in the record that the Applicants' credit rating will be upgraded or downgraded as a result of approving the merger proposal. Moreover, the Commission has decided that if it approves the merger it will condition approval with a requirement that any financial effects caused by a downgrade in the Applicants' credit rating shall be borne by the shareholders and not the ratepayers.

4. Customer Service and Service Quality

Company witness William Herdegen, Vice President Customer Operations, testified that integration efforts in the customer service area will focus on the best practices of KCPL and Aquila, with the expectation that customer satisfaction levels at both companies will reach Tier 1 as the complementary strengths of both companies are combined. Several

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[994] Indeed, Staff's witness Schallenberg indicated that a requirement of filing an operators and ownership agreement would eliminate its, Public Counsel's and the Industrial Intervenors' argument that the Applicants had not properly pled their application for the proposed merger. Transcript, pp. 3062-3064.

of the Aquila employees who were instrumental in achieving Aquila's high level of customer service have agreed to stay on following the merger. Great Plains intends to create a single call center for customers of both KCPL and Aquila, which will leverage the two companies' strengths. Great Plains is also reviewing the Customer Relations area in consideration of the expanded customer base and service territory, including expansion of its metering technology to the Aquila service territory. It is also reviewing billing services at both Aquila and KCPL to ensure easy and efficient payment options for customers throughout the service areas.

Additional customer service employees will be available at the time of the transition to help ensure service quality. Additionally, Great Plains intends to make all KCPL Affordability, Energy Efficiency, and Demand Response programs available to Aquila customers following the merger. There is overwhelming evidence in the record that the Applicants have planned sufficiently to ensure that customer service will not suffer as a result of the merger and in fact that customer service would improve to Aquila's customer base.

5. Tangential Benefits

There are benefits to the proposed merger that are difficult to precisely quantify but testimony was provided by a number of witnesses with regard to extensions of community programs, environmental programs, and workforce development.[995] There are also additional potential benefits that can be developed in terms of future quantifying of the effect of joint dispatch.

Performing its required balancing test, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusions that: (1) operational benefits, synergy savings, and expanded and improved customer service all weigh in favor of approving the merger; (2) because the Applicants will not be allowed to recover Transition Costs unless synergies achieved equal or exceed the level of such amortized costs, ratepayers are not subject to any risk regarding the recovery of these costs in rates; (3) because the Commission will condition approval on disallowance of Transaction Costs, the ratepayers will receive the benefits of the shareholders bearing these costs; (4) with no credible evidence of a potential downgrade in credit rating, and with the addition of a condition to ensure

[995] GPE/KCPL Exh. 3, Bassham Surrebuttal, pp. 1-8; GPE/KCPL Exh. 21, Marshall Supp. Direct, pp. 1-22.

that should a downgrade materialize that it is not borne by the ratepayers, the post-merger credit-worthiness of the Applicants is not a detriment to approving the proposed merger; and (5) the likelihood of additional tangential and currently unquantifiable benefits that will result from the merger weigh in favor of approving the merger.

6. Final Conclusions Regarding the Application of the "Not Detrimental to the Public Interest" Standard

The Commission finds that approving the proposed merger, with the conditions that it plans to impose, is not detrimental to the public interest. The Commission concludes the Applicants met their burden of establishing that there is no detriment to the public interest if the Commission authorizes the proposed merger. The Commission shall authorize the proposed merger subject to the conditions already contemplated and will consider other conditions requested by various parties to this action in other sections of this Report and Order.

Additionally, the Commission observes that synergy savings compose only one factor in the multi-factor "not detrimental to the public interest" balancing test. Given the number of positive benefits associated with the transaction, and the fact that no credible evidence establishes any negative effects from the merger (especially in light of the conditions imposed by the Commission as being necessary for approval), the Commission further concludes that even if it had not weighed the projected synergy savings when performing its balancing test, the Applicants still met their burden of proof that the proposed merger is not detrimental to the public interest.

G. Conclusions of Law Regarding the Commission's Affiliate Transactions Rule[996]

1. The Purpose of the Rule

The purpose of Commission Rule 4 CSR 240-20.015, as explicitly stated in the Rule is as follows:

> This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. In order to accomplish this objective, the rule sets forth financial standards, evidentiary standards and recordkeeping requirements applicable to any Missouri Public Service Commission (commission) regulated electrical corporation whenever such corporation participates in

[996] Refer to Findings of Facts Numbers 568-595 for this section.

> transactions with any affiliated entity (except with regard to HVAC services as defined in section 386.754, RSMo Supp. 1998, by the General Assembly of Missouri). The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities.[997]

2. Waiver Request

As noted previously in this Order, the Commission is granting conditional approval of the proposed transaction, and KCPL and Aquila will ultimately be separate affiliates of Great Plains if they chose to accept the Commission's conditions and finally consummate the transaction. Assuming the Applicants do consummate the transaction, Aquila and KCPL will remain separate legal entities, but many of the companies' operation functions will be integrated after the merger closes.[998] Necessarily the two affiliates will engage in transactions with each other, and the asymmetrical pricing requirements of the Rule, which were designed to prevent cross subsidization of a regulated utility's non regulated operations, would prevent the two regulated affiliates from exchanging goods and services at cost.

Because both Aquila and KCPL will continue to be regulated electrical corporations after approval of the transaction and both meet the Rule's definition of "affiliates," and because many of the synergies to be realized by the Applicants post-merger are premised on the ability of

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[997] Commission Rule 4 CSR 240.20-015. See also *In re Union Elec. Co.*, Case No. EO-2004-0108, 2005 Mo. PSC LEXIS 190 at 17, Report and Order on Rehearing at 38 (2005) ("… purpose of the affiliate transaction rule is to prevent cross-subsidization, in which a conglomerate including a regulated entity seeks to shift costs of its unregulated activities to its regulated customers"). Prior to the *Union Electric* case, the Commission defended the Rule at the Missouri Supreme Court in *State ex rel. Atmos Energy Corp. v. PSC*, 103 S.W.3d 753, 763-64 (Mo. 2003). The Court noted:

> In its brief, the PSC explained that the rules are a reaction to the emergence of a profit-producing scheme among public utilities termed "cross-subsidization," in which utilities abandon their traditional monopoly structure and expand into non-regulated areas. This expansion gives utilities the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities' customers. *Id*.

[998] KCPL's and Aquila's cost allocation manual will set forth how costs are to be allocated among KCPL, Aquila, Great Plains, and any other subsidiary of Great Plains.

KCPL and Aquila to exchange goods and services at cost, the Rule would actually prevent benefits from accruing to Missouri ratepayers. Consequently, the Applicants have argued that the Affiliate Transaction Rule does not apply to transactions between KCPL and Aquila, or in the alternative that they should be granted a waiver from the rule to the extent it would inhibit transactions at cost between KCPL and Aquila after the close of the merger.

Staff has suggested that the Affiliate Transactions Rule should apply, and that no waiver should be granted because it is unnecessary and beyond the scope of the proceeding since the Applicants have not requested authority to consolidate KCPL and Aquila. The Commission has already determined that Staff's position regarding the scope of this proceeding is incorrect, and under cross-examination, Staff witness Schallenberg agreed that the purpose of the Rule is to prevent regulated utilities from subsidizing their non-regulated operations and that after the close of the merger, the Commission will have full access to the books and records of both Aquila and KCPL.[999] Mr. Schallenberg also indicated that Staff was not generally opposed to transactions between Aquila and KCPL on a cost basis.[1000] Thus, there is no reason to apply the Rule in order to maintain access to the books and records of Aquila or KCPL, or to prevent cost-based transactions between Aquila and KCPL.

Because both Aquila and KCPL will be regulated electrical corporations, transactions between KCPL and Aquila do not involve cross-subsidization and these transactions were not intended to be covered by the Rule. However, because the Commission is imposing a condition on the merger of having KCPL and Aquila execute a joint operators agreement, the issue of cross-subsidization becomes blurred and the Commission concludes that a variance is required.

3. Final Conclusions Regarding the Affiliate Transactions Rule

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) the Commission's Affiliate Transactions Rule, 4 CSR 240.015, applies to KCPL and Aquila because these entities meet the Rule's definition of "affiliates"; (2) the purpose of the Commission's Affiliate Transactions Rule is to prevent cross-subsidization of regulated utility's non-regulated operations, not to prevent transactions at cost between two regulated

[999] Transcript, pp. 2070-2071.
[1000] Transcript, p. 2071.

affiliates; (3) to the extent that the Affiliate Transactions Rule is applicable to transactions between KCPL and Aquila, a variance shall be granted; and (4) more specifically, the variance shall be granted for all transactions except for wholesale power transactions, which would be based on rates approved by FERC.

The Commission finds as good cause for the variance to be the need to allow the applicants the ability to attain their projected synergy savings post-merger. The Commission further concludes there is no detriment, or any direct or indirect effect of the transaction, that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable, that is related to the granting of this variance in 4 CSR 240.015.

The Commission finally notes that although both KCPL and Aquila will continue to be subject to the Commission's recordkeeping requirements for regulated electrical corporations, the sections of 4 CSR 240.015 which relate to recordkeeping will not be waived. Because KCPL and Aquila will be maintaining their records pursuant to the Commission's regulations, one set of records should satisfy all regulatory requirements without being duplicative.

H. Conclusions of Law Regarding Other Potential Conditions to Place on the Approval of the Merger[1001]

1. Transmission and RTO/ISO Criteria, Quantification of Joint Dispatch, and Consolidation of Balancing Authority[1002]

In this proceeding, Independence has argued that it is necessary for the Commission to address the rate effects of the Applicants' intent to have Aquila participate in the Midwest ISO rather than the SPP. In particular, Independence has asserted that the Commission should require the Applicants to provide analysis of the rate effects of the merger, effects of joint generation dispatch, and the effects of Aquila's participation in the Midwest ISO as compared to SPP. Independence has also argued that the Commission should evaluate the rate and other effects of potential joint dispatch of the combined companies' generation resources in this proceeding.

Additionally, Dogwood and MJMEUC have argued that the Commission should condition the approval of the proposed transaction upon Aquila being required to join and operate its generation and

[1001] Refer to Findings of Facts Numbers 596-720 for this entire section.
[1002] Refer to Findings of Facts Numbers 596-651 for this sub-section.

transmission facilities under the auspices of the SPP RTO with KCPL. Similarly, Dogwood has argued that the Commission should condition the approval of the proposed transaction upon Aquila and KCPL being required to consolidate their balancing authority areas.

a. RTO/ISO Criteria

As a factual and legal matter, Aquila's RTO status is independent of the merger. The merger will have no direct effect on either KCPL's or Aquila's RTO status. Aquila has an application pending before the Commission in Case No. EO-2008-0046, regarding the transfer of functional control of its transmission facilities to Midwest ISO or another RTO. The evidentiary hearing in that case concluded April 15, 2008, and post-hearing briefs were submitted on May 29, 2008. The Commission has before it in that case a full evidentiary record concerning the benefits and costs associated with Aquila's RTO status. Such evidence is critical for the Commission's evaluation of which RTO, if any, would best serve Aquila and its customers. Moreover, although SPP and Midwest ISO were both active participants in that case, neither party is represented here.

It is noteworthy that FERC refused to condition its approval of the merger on Aquila being required to join SPP. FERC found as follows:

> We will decline the protestors' request to condition our section 203 authorization on the Applicants joining a particular RTO. When necessary, the Commission conditions merger authorization in order to address specific, merger-related harm; but no such harm has been identified in this proceeding. Moreover, the Applicants' future RTO status is unclear at this time and therefore, there is no baseline against which to assess merger-related changes to rates.[1003]

FERC considered Independence's assertions concerning the different cost structures of SPP and Midwest ISO, which are the same issues raised here by Independence and Dogwood Energy.

b. Quantification of Joint Dispatch

Great Plains does not propose to dispatch jointly the Aquila and KCPL generation fleets, and will retain the utilities' respective control areas.[1004] Any future decision to dispatch jointly will be subject to

[1003] *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 at P 50 (2007).
[1004] GPE/KCPL Exh. 11, Crawford Direct, p. 5.

regulatory approval, at which time a record would be fully developed concerning the effects of such action. In the FERC Merger Proceeding, Docket Nos. EC07-99-000 and EL07-75-000, Independence asked FERC to require KCPL and Aquila to quantify the effects of joint dispatch before being permitted to merge. In its order approving the merger, FERC denied that request.[1005]

KCPL and Aquila fulfill specific obligations set by FERC Orders 888 and 890 regarding open-access, non-discriminatory transmission service to customers. Following the merger, KCPL and Aquila will continue to provide transmission service through a federally-approved Open Access Transmission Tariff. Independence also raised this issue before FERC, arguing that KCPL and Aquila had not adequately evaluated the effect of the merger on transmission availability as part of their market power analysis in support of their application. FERC considered these same arguments that Independence now raises again in this proceeding and concluded that the merger did not create any transmission availability concerns.[1006]

c. Consolidation of Balancing Authority

Again, the Commission is presently evaluating Aquila's RTO status in a separate proceeding. Moreover, SPP is presently evaluating consolidating Balancing Authority operations within its footprint. Until these matters are resolved, it is premature and potentially redundant for KCPL and Aquila to pursue consolidation of their Balancing Authority operations.

d. Final Conclusions Regarding Transmission and RTO/ISO Criteria, Quantification of Joint Dispatch, and Consolidation of Balancing Authority

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) it is unnecessary and premature to require the Applicants to evaluate the potential effects of Aquila's RTO status; (2) it is unnecessary and premature to require the Applicants to quantify the effects of joint dispatch of the generation fleets; and (3) it is unnecessary and premature to require the Applicants to consolidate their balancing authority.

[1005] *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 at Para. 36 (2007).
[1006] *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 at Para. 34, 35 and 37 (2007).

The Commission further concludes there is no detriment to the public interest created by not conditioning the merger with regard to the above issues. There is no competent or credible evidence in the record to support a conclusion that anything would directly or indirectly make the power supply less safe or less adequate, or would tend to make rates less just or less reasonable by not imposing said conditions in this proceeding.

2. The Kansas City and KCPL Municipal Franchise Agreement[1007]

a. Authority of the Commission

The Commission first notes that it is an administrative body of limited jurisdiction, created by statute and has only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto.[1008] Those powers are purely regulatory.[1009] The dominating purpose in the creation of the Commission was to promote the public welfare, and to that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, *not to direct its use*, because exercise of the latter function would involve a property right in the utility.[1010] "The utility's ownership of its business and property includes the right of control and management, subject, necessarily, to state regulation through the Public Service Commission."[1011]

"The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare."[1012]

The Commission further notes that the Missouri Constitution commands that "[t]he exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of

[1007] Refer to Findings of Facts Numbers 652-680 for this section.
[1008] *State ex rel. Harline v. Public Service Commission of Mo*., 343 S.W.2d 177, 181-182 (Mo. App. 1960).
[1009] *Id*.
[1010] *Id*.
[1011] *Id*.
[1012] *Id*.

individual or the general well-being of the state."[1013] This prohibition is not limited to private corporations. The Missouri Supreme Court also has concluded that the legislature cannot "authorize a municipal corporation to make a contract abridging or limiting . . . the police power."[1014]

Kansas City has requested that the Commission condition approval of the proposed merger upon a requirement that KCPL negotiate a new Franchise Agreement with Kansas City that would uniformly apply to both KCPL and KCPL's newly created sister subsidiary, Aquila. Kansas City argues that the Commission has broad authority to override franchises and contracts in order to maintain and preserve the public welfare.[1015] Kansas City further argues that a franchise agreement is not truly a contract, but merely a license for a term of years. Consequently, Kansas City claims that Great Plains and KCPL's impairment of contract defense is not a cognizable legal defense and states that it would serve the public interest for there to be one franchise for a single operational company. Conversely, Kansas City argues it would constitute a detriment if the Commission did not require a new franchise agreement with the unified companies and lacking such an agreement creates the risk that Kansas City will be exposed to disruption in its ability to effectively manage its right-of-way, which in turn would adversely affect the public welfare.

The Kansas City Franchise Agreement does not contain a limitation on its duration. Under Missouri law, a franchise agreement that does not specify a period of duration is a grant in perpetuity.[1016] Perpetual franchise agreements are grants of property rights protected

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[1013] See Missouri Const., § 5, art. 12; *State ex rel. City of Sedalia v. PSC*, 204 S.W. 497, 498-99 (Mo. 1918).

[1014] See *State ex rel. Kansas City v. PSC*, 524 S.W.2d 855, 859 (Mo. 1975)(police power cannot be hindered or frustrated by contracts between individuals, companies or governmental subdivisions); *State ex rel. Kansas City Pub. Serv. Co. v. Latshaw*, 30 S.W.2d 105, 108 (Mo. 1930)(Legislature cannot authorize municipal corporations to make contracts with utilities regarding rates that prevent the state from establishing reasonable rates); Sedalia, 204 S.W. at 497.

[1015] EFIS Docket Number 302, *City of Kansas City's Updated Prehearing Brief*, p. 4, filed April 15, 2008, citing to *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 48 (Mo. 1937). In *May* the Commission did exercise its authority to override a contract regarding the provision of electric service between a utility and a large user because that contract limited the regulatory authority of the Commission. However, the franchise agreement between Kansas City and KCPL does not interfere with the Commission's regulatory authority.

[1016] *Missouri Pub. Serv. Co. v. Platte-Clay Elec. Cooperative*, 407 S.W.2d 883, 889 (1966); *State ex rel. McKittrick v. Missouri Pub. Serv. Corp.*, 174 S.W.2d 871, 879 (Mo. 1943); *State ex rel. Chaney v. West Missouri Power Co.*, 281 S.W. 709, 714 (Mo. 1926).

from impairment by the Contract Clauses of the United States and Missouri Constitutions.[1017] In the absence of a finding by the Commission that the Franchise Agreement frustrates or hinders the proper exercise of its police power, the Commission concludes that it cannot grant Kansas City's requested relief without impairing KCPL's contractual rights.[1018]

The Commission finds that the continued operation of the Franchise Agreement in no way frustrates or hinders the Commission's ability to exercise the State's police power. In addition, Kansas City has failed to introduce any credible evidence into the record upon which the Commission could base a decision to abrogate the Franchise Agreement, or condition the proposed merger on KCPL's "willingness" to relinquish its rights under the Franchise Agreement. Kansas City has failed to introduce into the record any credible evidence that the Franchise Agreement, after governing the relationship between Kansas City and KCPL for 126 years, now threatens the Commission's ability to protect the health, safety, and general welfare of the citizens of Missouri. While Kansas City and KCPL may have had some problems requiring resolution over the years, in total there is no credible or substantial evidence in the record establishing that KCPL is not meeting its obligations regarding relocations, mapping, or cooperation with Kansas City concerning building projects. On the contrary, the evidence indicates that KCPL and Kansas City, in general, have a very good working relationship.

b. Final Conclusion Regarding the Kansas City and KCPL Municipal Franchise Agreement

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) the current Franchise Agreements between KCPL and Kansas City and Aquila and Kansas City do not infringe the equal rights of individuals or the general well-being of the state; (2) without a demonstration that the current agreements are a detriment to the public interest, the Commission lacks authority under Missouri and federal law to abrogate the existing Franchise Agreement between KCPL and Kansas City; (3) the Commission will not condition the approval of the proposed merger upon Kansas City's requested condition for the negotiation and execution of a single, unitary franchise between KCPL/Aquila and

[1017] See U.S. Const., art. I, § 10; Missouri Const., art. I, § 13.
[1018] *XO Missouri, Inc. v. Maryland Heights*, 256 F. Supp. 2d 966, 974 (E.D. Mo. 2002).

Kansas City; and, (4) it is not a detriment to the public interest not to condition the approval of the proposed merger on requiring the negotiation and execution of a single, unitary franchise between KCPL/Aquila and Kansas City.

3. The St. Joseph and Aquila Municipal Franchise Agreement[1019]

a. Authority of the Commission

Similarly, St. Joseph wants the Commission to condition the approval of the merger upon Aquila negotiating a new municipal franchise with St. Joseph. As an initial matter, the Commission received St. Joseph's Exhibit 1200 subject to the Applicants' objections as noted in Findings of Fact Numbers 684-688. The Commission sustains those objections as Exhibit 1200 is unauthenticated and is hearsay. Additionally, St. Joseph did not comply with Section 536.070(12) which requires that affidavits to be used at hearing shall be provided before the hearing so that parties may object to them. However, pursuant to Section 536.070(7) and 4 CSR 240-2.130(3), the Commission will preserve this exhibit in the record.

St. Joseph has submitted no credible or substantial evidence to establish that Aquila's St. Joseph franchise is no longer valid. Regardless, the Commission does not have the authority to judge the validity of a franchise agreement.[1020]

b. Final Conclusions Regarding the St. Joseph and Aquila Municipal Franchise Agreement

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) for the same reasons articulated in the conclusions of law section regarding the issue of the municipal franchise agreement with Kansas City, the Commission concludes that it will not condition the proposed merger on the negotiation and execution of a new franchise agreement between Aquila, or its successor, and St. Joseph; and, (2) it is not a detriment to the public interest not to condition the approval of the proposed merger on requiring the negotiation and execution of a new franchise agreement between Aquila, or its successor, and St. Joseph.

[1019] Refer to Findings of Facts Numbers 681-690 for this section.
[1020] *See State ex rel. Electric Co. of Missouri v. Atkinson*, 204 S.W. 897, 898 (Mo. 1918).

4. Kansas City's Request for a Separate Quality of Service Plan[1021]

a. Kansas City's Request

In this proceeding, the City of Kansas City, Missouri has requested that the Commission condition the approval of the Joint Application upon requiring KCPL and Aquila to file an application for a Quality of Service Plan within 90 days of the Commission's final decision in this proceeding. However, Staff already reviews the very performance measures mentioned by Kansas City witness Hix as part of its Cost of Service report when KCPL files a rate case. Mr. Hix was unfamiliar with the Commission's quality of service standards, its management standards, or its reliability metrics. In fact, Mr. Hix's testimony was inconsistent in that he found the Commission's standards to be good measures of performance while also stating that he did not care about the thresholds under SAIFI, SAIDI, or CAIFI. Mr. Hix provided no credible evidence that the proposed merger would have any effect on KCPL's service quality.

The only other significant suggestion that Mr. Hix offered the Commission in relation to this issue was the concept that the Commission should adopt provisions for reparations to customers when a company underperforms. While this is a laudable idea, it is one more appropriately addressed in a global rulemaking proceeding as opposed to an individual merger application.

b. Final Conclusions Regarding Kansas City's Request for a Separate Quality of Service Plan

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) there is no credible evidence in the record that a quality of service plan, as proposed by Kansas City is warranted; (2) the Commission Staff already receives and reviews much of the information Kansas City would have KCPL and Aquila provide as part of its proposal as part of the Staff's Cost of Service report when a utility files a rate case; (3) in KCPL's last rate case (ER-2007-0291), the Staff reviewed five years of this data and found no evidence of long-term trends that raise a cause for concern by the Commission; and (4) the Commission will not condition the merger on upon requiring KCPL to submit a separate Quality of Service plan.

[1021] Refer to Findings of Facts Numbers 691-701 for this section.

Moreover, the Commission already has in place the mechanisms for challenging KCPL regarding quality of service issues and underperformance. Any interested entity can elect to initiate a complaint or over-earnings action against KCPL to address the adequacy of the service that KCPL provides. The Commission further concludes there is no detriment, or any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable, that is related to not conditioning the proposed merger upon a requirement for KCPL to submit a separate quality of service plan.

5. Kansas City's Proposed Earnings Sharing Mechanism[1022]

a. Earnings Sharing Mechanism Proposal

Kansas City also proposed that, in order for the merger to be not detrimental to the public interest, the merger be conditioned upon KCPL and Aquila filing an Earnings Sharing Mechanism that returns a portion of excess earnings above the Commission's authorized rate of return to customers.

Again, while Kansas City's proposal is laudable, Kansas City's witness Mr. Hix's lack of understanding and analysis as to the specifics of this case are fatal to the request. Earnings sharing mechanisms are used when the cost of service is expected to be flat or declining over the time the synergies are expected to occur. Absent increases in cost of service, the synergies would result in excess earnings above an authorized rate of return. The evidence reveals that KCPL and Aquila are currently engaged in major generation construction programs, and both companies will need to raise additional capital beyond their current construction programs to meet environmental regulations, which will require KCPL and Aquila to file rate cases with the Commission in the year after the transaction closes. These rate increases are necessary to recover the costs of the infrastructure as it is placed into service and although those costs will exceed the total estimated synergies of the acquisition during the next several years, the synergies will result in smaller rate increases absent the transaction.

There will be no excess earnings to share initially, and the Commission finds the method of sharing synergies by use of the mechanism of regulatory lag, as proposed, is sufficient. Moreover, the Commission notes that it lacks statutory authority to order a utility to

[1022] Refer to Findings of Facts Numbers 702-715 for this section.

share earnings with customers. The Commission may approve a voluntary earnings sharing plan that comes about as a result of negotiations between the utility, Staff, Public Counsel, and other interested parties, and may only approve such a plan where it finds that it is in the public interest to do so.[1023]

b. Final Conclusions Regarding Kansas City's Proposed Earnings Sharing Mechanism

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusions that: (1) the Commission lacks the statutory authority required to impose a non-voluntary earnings sharing mechanism upon KCPL/Aquila; (2) that the mechanism of regulatory lag is the proper method for sharing synergies derived from the merger, (3) the Commission shall not condition the merger upon the establishment of an earnings sharing mechanism as proposed by Kansas City; and, (4) the Commission does not find any detriment, or any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable, that is related to not conditioning the proposed merger upon a requirement for KCPL to establishing an Earnings Sharing Mechanism.

6. Kansas City's Proposed Future Consolidated Rate Case[1024]

a. Future Consolidated Rate Case Proposal

Kansas City's final proposal is that KCPL and Aquila be required to file a comprehensive rate case within three years after the Commission's approval of the transaction. Part of this proposal appears to be intertwined with Kansas City wanting Aquila and KCPL to integrate their financial and system operations into a structure that can be comprehensively evaluated for efficiencies and improved operations. This proposal is improperly premised because Great Plains does not seek to merge KCPL and Aquila. Great Plains, the parent company of KCPL, is requesting approval to acquire Aquila. Aquila will retain and continue to operate under its Commission-approved tariffs. KCPL and Aquila will maintain separate generation, transmission, and distribution systems. Additionally, the timing of KCPL's rate cases is influenced by

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[1023] Case Number ER-95-411, *In re Union Elec. Co*., Order Adopting Stipulation and Agreement, effective August 1, 1995, 1995 WL 606416 (Mo. P.S.C.), 163 P.U.R.4th 458, 458.

[1024] Refer to Findings of Facts Numbers 715-720 for this section.

its commitments and activities under the Regulatory Plan Stipulation, Case No. EO-2007-0329.

b. Final Conclusion Regarding Kansas City's Proposed Future Consolidated Rate Case

The Commission determines that substantial and competent evidence in the record as a whole supports the conclusion that it is unnecessary to add this condition to its approval of the merger. Kansas City's request contemplates requiring the merger or consolidation of KCPL and Aquila, something that is not part of the merger proposal; and, the Commission concludes there is no detriment, or any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable, that is related to requiring a condition for a comprehensive rate case as proposed by Kansas City.

7. Kansas City's Proposed Condition for a Comprehensive Energy Audit[1025]

On April 8, 2008, Kansas City withdrew the testimony of rebuttal witness Stanley J. Harris and represented that it was withdrawing its proposal for a requirement of a comprehensive energy audit. Kansas City indicated that this was no longer an issue in this matter. Consequently, the Commission made no findings of fact on this subject matter and similarly renders no conclusions of law regarding Kansas City's initial proposed condition.[1026]

8. Name Change[1027]

As part of the Applicants' original request, they asked to the Commission to authorize a name change for Aquila, Inc., once a new name for the company had been chosen. At one point during the evidentiary hearing, there was mention of a possible new name for Aquila, i.e., KCPL Greater Missouri Operations.[1028] The Applicants' current request does not satisfy the Commission's rules governing name changes.[1029] The Commission shall deny this request and require a proper name change application prior to considering any name change for Aquila, Inc.

[1025] Because this issue was removed by the parties, the Commission made no findings of fact in connection with it.
[1026] See *Correspondence to Judge Dale Withdrawing the Prefiled Written Testimony of Mr. Stan Harris*, EFIS Docket Entry Number 290, filed April 8, 2008.
[1027] No findings of fact were required for this section because the issue solely involves an issue of law.
[1028] Transcript, p. 2221
[1029] See Commission rule 4 CSR 240-2.060(5).

9. Transition Services Agreement

On August 2, 2007, the Applicants filed a Transition Services Agreement and Amendment 1 to the TSA, including a Schedule of Services to be provided between the Applicants and Black Hills Corporation. The TSA was executed on February 6, 2007, and Amendment 1 was executed on July 30, 2007. Because these documents were executed prior to the changes in the merger proposal and have not been updated, the Commission shall require the Applicants to either file a pleading with the Commission stating whether the TSA, as it currently exists, is accurate and up-to-date, or file with the Commission a new TSA including all necessary amendments thereto to account for any changes that resulted from the changes in the merger proposal.

I. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.[1030] The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.[1031]

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.[1032] "Courts are not concerned with alleged inconsistency between current and prior

[1030] *In re City of Kinloch,* 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

[1031] *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

[1032] *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 - 173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue,* 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue,* 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue,* 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n,* 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable."[1033] The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.[1034] "In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively."[1035]

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

Although a number of parties offered objections or conditions, a fair reading of the record does not reveal any serious impediment to a conclusion that the proposal is not detrimental to the public interest. To the contrary, given the failure of the opposition to offer a serious analysis of the Applicants' merger synergy savings evidence, and the absence of any real objection to the revised regulatory requests, and no evidence

[1033] *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).
[1034] *Id.*
[1035] *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, State Administrative Law, pp. 177 et seq. (1965); Mayton, The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking, Duke Law Journal, Vol. 1980: 103, 118.

beyond speculation that any detriment would result to the public interest, the Commission is not faced with any good reason to disapprove the request. The Applicants have met their burden to establish that the proposed transaction is not detrimental to the public interest, and; consequently, "[t]he Commission may not withhold its approval of the disposition of assets . . . ."[1036]

The Commission concludes that the transaction proposed by the Applicants, as conditioned by the Commission, is not detrimental to the public interest and shall approve it. The specific conditions the Commission shall impose will be delineated in full in the Ordered Paragraphs below.

IT IS ORDERED THAT:

1. The "Joint Application of Great Plains Energy Incorporated, Kansas City Power and Light Company and Aquila, Inc.," filed on April 4, 2007, and as subsequently amended by additional filings on February 25, 2008, seeking Commission authorization for Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., to perform in accordance with the terms and conditions of the Agreement and Plan of Merger, Assets Purchase Agreement, Partnership Interests Purchase Agreement, and all other transaction-related instruments, is hereby granted, subject to the conditions delineated in the ordered paragraphs below.

2. Great Plains Energy Incorporated is authorized to acquire and assume the stocks, bonds, and other indebtedness and obligations of Aquila, Inc., as described in particular in the Agreement and Plan of Merger.

3. Aquila, Inc. is authorized to merge with Gregory Acquisition Corporation, a wholly-owned subsidiary of Great Plains Energy Incorporated, with Aquila, Inc., becoming the surviving entity, as described in particular in the Agreement and Plan of Merger.

4. Great Plains Energy Incorporated, Gregory Acquisition Corporation, Kansas City Power & Light Company, and Aquila, Inc., are authorized to take any and all other lawful actions that may be reasonably necessary and incidental to the performance of the approved Joint Application for the merger.

[1036] *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

5. Great Plains Energy, Incorporated, Kansas City Power & Light Company, and Aquila, Inc., are directed to comply with the terms of the transactions authorized in Ordered Paragraph Number One.

6. Authorization of the transactions described in Ordered Paragraphs Number One through Five are subject to the following conditions:

a. Great Plains Energy, Incorporated will not be allowed to recover transaction costs associated with the transactions from ratepayers;

b. Within ninety days of the effective date of this Report and Order, Kansas City Power & Light Company, and Aquila, Inc., shall execute and file with the Commission a joint operating agreement;

c. Great Plains Energy, Incorporated, Kansas City Power & Light Company, and Aquila, Inc., shall, upon closure of the authorized transactions, implement a synergy savings tracking mechanism as described by the Applicants, and in the body of this order, utilizing a base year of 2006;

d. Beginning ninety days after the closure of the authorized transactions, KCPL and Aquila will, on a quarterly basis, engage in periodic customer service performance reviews with the Commission's Staff, including the quarterly filing with Staff of monthly service quality data;

7. No later than one week following the effective date of this Report and Order, the Applicants shall file a pleading with the Commission stating whether the Transition Services Agreement executed on February 6, 2007 and Amended on July 30, 2007, is accurate and up-to-date. If the Transition Services Agreement, as it currently exists, requires further amendment, then within ninety days following the effective date of this Report and Order, Great Plains Energy, Incorporated, Kansas City Power & Light Company, and Aquila, Inc., and any necessary subsidiaries of Great Plains Energy, shall execute and file with the Commission a new Transition Service Agreement to cover any transition service issues, including among other things, the temporary provision of customer support, information technology, and accounting services by one of the merged companies' with any of the subsidiaries, or *vice versa*.

8. In addition to the conditions outlined in Ordered Paragraph Number Three, the Commission conditions its authorization of

the transactions described in Ordered Paragraph Number One of this Report and Order upon a requirement that any post-merger financial effect of a credit downgrade of Great Plains Energy Incorporated, Kansas City Power & Light Company, and/or Aquila, Inc., that occurs as a result of the merger, shall be borne by the shareholders of said companies and not the ratepayers.

9. Great Plains Energy Incorporated's, Kansas City Power & Light Company's and Aquila, Inc.'s request for a name change for Aquila, Inc. in this application is denied. The Applicants shall be required to submit an appropriate name change request that is fully compliant with Commission rules prior to a grant of a name change for Aquila.

10. The Commission grants a limited variance of its Affiliate Transaction Rule to Kansas City Power & Light Company and Aquila, Inc., as described in detail in the Conclusions of Law Section of this Report and Order.

11. The objections to the City of St. Joseph, Missouri's Exhibit 1200, as delineated in the body of this order, are sustained. Exhibit 1200 shall be preserved in the record, but the Commission has not considered this unauthenticated, hearsay exhibit when making its final determinations in this matter.

12. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein are hereby denied.

13. Nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.

14. The Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

15. No later than August 11, 2008, Great Plains Energy Incorporated, Kansas City Power & Light Company and Aquila, Inc., shall file with the Commission a pleading indicating if they consummated the merger or exercised their respective rights under the termination clause of the merger agreement or if they took some other alternative action.

16. This Report and Order shall become effective on July 11, 2008.

Murray and Jarrett, CC., concur;
Clayton, C., dissents, with separate
dissenting opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.
Davis, Chm., and Gunn, C., absent.

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the majority's[1] Report and Order approving Great Plains Energy Incorporated ("GPE"), Kansas City Power & Light ("KCPL"), and Aquila Inc's ("Aquila") request to merge Aquila with a subsidiary of GPE. The applicants failed to meet their burden of proving that the transaction is not detrimental to the public interest. The approved transaction as well as the applicants' original proposal place far too much risk on the shoulders of both companies' ratepayers. Aquila shareholders will enjoy the immediate benefit because of the price being paid for their shares. GPE and KCPL shareholders also have much to gain if the transaction is successful. However, this Commissioner has great concerns that in the

[1] Because of prior Commissioner recusals, Commissioners Murray, Jarrett and Clayton are the only voting Commissioners involved in the case.

near future KCPL and Aquila will be back to the Commission looking for "regulatory support" or "additional amortizations" to protect their financial integrity. These terms translate into higher utility rates for all of the applicants' customers. While there is the possibility that the merger will be a success, this Commissioner believes there is simply too much risk for a speculative benefit that may not occur. Even if those benefits materialize, they will not occur for many years in the future.

For the reasons that follow, this Commissioner must dissent and forewarn future Commissions that the companies may be back in the future with requests for financial help.

"SOUNDS LIKE A GREAT IDEA"

If one is familiar with the recent history associated with KCPL and Aquila, conventional wisdom and common sense suggest that such a merger, on its surface, makes a great deal of sense. GPE/KCPL have had a successful financial run in recent years[2] and have effectively begun construction of a significant expansion of necessary generation facilities at Iatan 2.[3] GPE/KCPL have stepped forward to initiate dialogue on climate issues,[4] new efforts at energy efficiency,[5]new efforts for

[2] Exh. 9, p. 11, Ins. 17-18, Schs. MWC-4 (HC) & MWC-5 (HC) (Cline Supplemental Direct); *see In The Matter Of Kansas City Power & Light Company Of Kansas City, Missouri, For Authority To File Tares Increasing Rates For Electric Service Provided To Customers In The Missouri Service Area Of The Company, And The Determination Of In-Service Criteria For Kansas City Power & Light Company Wolf Creek Generating Station And Wolf Creek Rate Base And Related Issues,* Case No. E0-85-185; *In The Matter Of A Stipulation And Agreement Reducing The Annual Missouri Electric Revenues Of Kansas City Power & Light Company,* Case No. ER-94-197 (emphasis added); *In The Matter Of The Investigation Of Kansas City Power & Light Company's Customer Class Cost Of Service And Rate Design,* Case No. E0- 94-199; *In The Matter Of The Stipulation And Agreement Reducing The Annual Missouri Retail Electric Revenues Of Kansas City Power And Light Company,* Case No. ER-99-313 (emphasis added). *See also* Form 10-K filings for years 2000 through 2005. http://www.sec.gov/cgi-bin/browse-edgar?type=10-k&dateb=&owner=include&count=40&action=getcompany&CIK=0001143068; Exh. 10, p. 17,Ins. 4-7 (Cline Surrebuttal).

[3] *1n the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company,* Case No. E0-2005-0329.

[4] *In the Matter of the Resource Plan of Kansas City Power & Light Company Pursuant to CSR 240-22;* Case No. EO-2007-0008.

[5] Kansas City Energy Efficiency Forum, Sept. 14, 2007, <http://www.keenergyfuture.corn>; "KCP&L's Energy Efficiency Programs: Partnerships that Make a Difference," http://www. kcenergyfuture.com/eehandout.pdf.

effective Demand Response programs,[6] and "smart metering."[7] In recent years, KCPL has received exceptional treatment from the Commission through authorized rates of return that exceed national averages, including one award that was the nation's highest for a traditionally-regulated, vertically integrated electric utility.[8]

Meanwhile, Aquila has struggled to recover from a string of questionable business decisions and poorly executed endeavors. Its ventures into unregulated sectors were painfully unsuccessful.[9] Aquila had one power plant under threat of demolition because of poor planning[10] and its shareholders have been required to fund its extraordinarily high debt costs because the Commission has been unwilling to allow it to recover those costs in rates.[11] Prior to the

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[6] *See* Kansas City Power and Light Company, P.S.C. MO. No. 7, Sheet 21. *In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power & Light Company,* Case No. EO-2005-0329, Report and Order (issued July 2S, 2005), Attachment 1, Stipulation and Agreement, Paragraph III.B.5.

[7] "KCP&L Wins 'Best Practices Award For Utility Marketing' For Its Innovative ThermoCalc Integrated Media Campaign," Business Wire, Oct. 26, 2006, <http://findarticles.com/p/articles/mi mOEIN/is2006_0ct_26/ai_n27028707>.

[8] This Commissioner has opposed the grants of inappropriately high Returns on Equity in *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan* Case No. ER-2006-0314 and *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan,* Case No. ER-20070291.

[9] *See In The Matter Of The Application Of Aquila, Inc. For Authority To Assign, Transfer, Mortgage Or Encumber Its Franchise, Works Or System,* Case No. EF-2003-0465.

[10] *See In the Matter of the Application of Aquila, Inc. for Specific Confirmation or, in the Alternative, Issuance of a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain a Combustion Turbine Electric Generating Station and Associated Electric Transmission Substations in Unincorporated Areas of Cass County, Missouri Near the Town of Peculiar,* Case No. EA-2005-0248, *State ex rel. Cass* County, *Missouri v. Public Service* Commission, Docket No. CV105558CC (Circuit Court of Cass County), and *In the Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and otherwise Control and Manage, and Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri Near the town of Peculiar,* Case No. EA-2006-0309, *State ex rel. Cass County v. Public Service Comm.,S.W. 3[d] ,* WL564611 (Mo.App., W.D., March 4, 2008)

[11] *See In the matter of Aquila, Inc. d/b/a Aquila Networks-MPS and Aquila Networks-L&P, for authority to file tariffs increasing electric rates* for *the service provided to customers in the Aquila Networks-MPS and Aquila Networks-L&P area,* Case No. ER-2005-0436, *In the matter of Aquila, Inc. d/b/a Aquila NetworksL&P, for authority to file tariffs increasing steam rates for the service provided to customers in the Aquila Networks-L&P area,* Case No. HR-2005-0450; and *In the matter of Aquila,*

conclusion of this case, Aquila's weakened financial status was recognized as "junk" by credit rating agencies.[12] In its efforts to climb back to "investment grade," Aquila has been forced to sell off many of its well-performing divisions, including all of its international endeavors, a few of its regulated utilities in other states and all unregulated business ventures.[13]

Both utilities are in the Kansas City Metropolitan Area with adjacent service territories and appear well suited to merge with joint headquarters and combined facilities to achieve synergy savings. In theory, the stronger utility takes over the weaker utility for the final product being one western Missouri holding company operating various units capable of maximizing greater economies of scale and being able to finance even larger projects to serve their combined customers.

Such factors could easily lead one to believe that a merger, at any cost, between the two companies was preferable to having the weaker of the two continuing to struggle.

DEVIL IS IN THE DETAILS

However, one must scrutinize the transaction at a deeper level, beyond a simple review, and consider the implications of the merger. Career PSC staff have argued that this transaction fails to meet its standards for approving such a merger because of the price being paid to Aquila shareholders, how the case was filed, how the deal included lucrative provisions to benefit shareholders, how risk was shifted to ratepayers, the current capital constraints faced by GPE/KCPL and inadequate planning and preparation. The staff, the Office of Public Counsel (OPC) and other parties, thus, concluded that the transaction was detrimental to the public interest. The Commission should have heeded the recommendations of its career staff and the other non-utility parties, applied greater scrutiny to the transaction and denied the application in the interests of the rate paying public. There is too little benefit for ratepayers when compared to the real and significant risk if the acquisition or integration falters.

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lnc. d/b/a Aquila Networks L&P and Aquila Networks MPS to implement a general rate increase in electricity, Case No. ER-2004-0034.

[12] *See Exh.* 1 (Basshatn Direct); Exh. 200 (Dittmer Rebuttal); Exh. 10 (Cline Surrehuttal); Exh. 8 (Cline Supp. Direct).

[13] "Company News; Aquila Sells Its 70% Stake In Electricity Distributor," *New York Times,* October 12,2002, <http ://query.nytimes.com/gst/fullpage.html?res=9B06E0DF133AF931A25753C I A9649C8B63>.

Moreover, this is the wrong transaction at the wrong time. GPE/KCPL are in the midst of completing a number of significant capital projects. These projects, which include Missouri's largest utility construction project since the early 1980s in Iatan 2, were clearly identified in the Comprehensive Energy Plan (CEP) as part of a global settlement among a number of parties.[14] GPE/KCPL committed to placing their focus entirely on those capital projects.[15] In exchange for that commitment, the non-utility parties agreed to allow the companies the opportunity to seek additional cash flow through "additional amortizations."[16] "Additional Amortizations" may also be characterized as accelerated depreciation, which is a component of the revenue requirement and is used in rate making. More amortizations or depreciation allowances increase rates and improve the cash flow of the utility. The increased cash flow would provide the companies with the regulatory support necessary to maintain certain credit metrics and satisfy Wall Street during a period of significant investment.[17] The Commission endorsed the arrangement because of GPE/KCPL's need for the investment and the risk it faced in being downgraded prior to the units being placed in service. However, despite the supposed cash crunch faced by GPE/KCPL, the applicants now suggest that they have the cash to purchase another utility during this time period.

Additionally, the evidence at hearing suggested that GPE/KCPL are having difficulties with cost overruns and accidents related to their on-going construction projects.[18] While some of these difficulties may not be the fault of KCPL or GPE, these projects should be completed at a time free from distraction. Some projects have been delayed beyond the years of the CEP[19] and some contemplated projects have been canceled due to unforeseen reasons.[20]

More time may also offer Aquila the opportunity to shed its "junk" status as it continues to follow its strategies for returning to

[14] *See also in the Matter of a Proposed Experimental Regulatory Plan for Kansas City Power and Light Company,* Case No. E0-2005-0329.
[15] *Id.,* Stipulation and Agreement, ¶¶ III.B.1.a and III.B.1.i.
[16] Tr. 23:2986-3020.
[17] *Id.*
[18] Tr. 19:2479-2481, 2484; Exh. 305, Securities and Exchange Commission Form 8-K, p. 2-3.
[19] *Compare* Exh. 123, 138 *and* 139.
[20] *Application of Kansas City Power & Light Company for the Opening Of A Proceeding To File Status Report On Wind Investments,* Case No. EO-2008-0224, Application And Status Report On Wind Investment, Jan. 4, 2008.

"investment grade."[21] The most surprising testimony during the evidentiary hearing was the praise offered to Aquila for its efforts at improving its performance and position in the community.[22] Aquila shareholders and ratepayers may have an interest in seeing Aquila return to "investment grade" without such a sale.[23] Now is not the time for a merger for either company.

UNIQUE CHARACTER OF CASE

The Commission cannot lose sight of how this case was started, how it was filed and what relief was requested. All of the applicants' preparation in the case, including the purchase of rating agency opinions, alleged communication with regulators and the completion of due diligence reports, were focused on several, controversial regulatory policies. These requests included the unprecedented policy of using regulatory amortizations to fund part of the transaction (potentially violating the agreement in the CEP),[24] of placing Aquila's higher debt costs into rates paid by the customers of both companies (which is in direct conflict of past agreements among staff, OPC and Aquila),[25] of advancing 50% of the projected synergy savings without regard to those savings actually being achieved (which has never been authorized or allowed in Missouri),[26] and authorizing an acquisition adjustment to cover expenses in the transaction (which is in conflict with Commission policy).[27]

Had the original proposal been presented, the Commission would have faced requests for regulatory treatment of issues valued at least $397.15 million and up to $466.15 million being placed into rates paid by the companies' customers.[28] These extraordinary

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[21] Tr. 4:408, 411-412.
[22] Tr. 23:3074.
[23] *Id.*
[24] *See In the Matter of a Proposed Experimental Regulatory Plan for Kansas City Power and Light Company,* Case No. EO-2005-0329.
[25] *See* n. 11, *supra; see also* Ex. 203.
[26] Exh. 100, Staff Report, pp. 43, 46-48.
[27] *Id.* at 49-53.
[28] The Applicants' original proposal requested special regulatory treatment for certain costs to be included in rates in the next general rate case filing. Their proposal included "transaction costs," ($69.3 million), which includes executive severance packages, Tr. 9:1304, "transition costs" ($33 million), Tr. 9:1304, authorizing GPE/KCPL to recover Aquila's actual cost of debt based on "junk" status ($120 million),

requests were the cornerstone of the opposition and the facts on which the opponents of the transaction based their cases. Much of the information relied upon by the applicants was considered "Flighty Confidential" and beyond the review of the public. Additional questions were raised regarding the communication of such provisions to the Commissioners in advance of the hearing with allegations of commitments to support the transaction prior to the evidentiary hearing. Armed with concerns over the process and a potent case against the extraordinary and unprecedented rate making requests, the opponents to the transaction were able to disrupt the case through pre-hearing motions and opening statements.

It is not uncommon that parties before the Commission will change their positions while a case moves through the process, however, in this instance, the applicants asked for a delay in the proceedings to produce a completely different transaction. The applicants had the luxury to witness the reactions of Commissioners and then amend their proposal with a better view into Commissioners' concerns. By allowing the applicants to consider new strategies, the Commission abdicated its responsibility in presiding over and processing this case. The Commission should have reconvened the evidentiary hearing and rendered a decision based on the testimony proposed for the December evidentiary hearing.[29] If the applicants were not prepared to move forward, the case could have been dismissed and refiled at the applicants' leisure. In this case, however, the applicants were given the extraordinary privilege of rethinking their strategy following a week of questioning by Commissioners and filing a more palatable, less lucrative proposal in an effort to satisfy regulators. Despite having their testimony and reports fully briefed and filed in anticipation of the December hearing, the opposing parties learned that they would have to face a new case requiring new analysis. The case languished as the applicants were given two and a half months to prepare a revised strategy.

The opponents of the transaction were subjected to a number of rather unique and unorthodox circumstances in opposing the transaction.

Exit. 38, p. 4, Sch. MWC-17 (Cline Additional Supplemental Direct), advance 50% of the Applicants' estimate of synergies through an allocation in rates ($129.85 million), Exh. 100, Staff Report, p. 43, and authorizing "additional amortizations"($45 to 114 million), Exh. 105, p. 25, to support the continued construction costs *of* the CEP. These costs total $397.15 to 466.15 million.

[29] Dissenting Opinion of Commissioner Robert M. Clayton, February 14, 2008.

Aside from the allegations made during the December evidentiary hearing and the subsequent delay in the proceedings, motions were left pending for months while the case as on hold;[30] the majority authorized its own outside counsel law firm to enter its appearance in the case on behalf of the applicants;[31] two Commissioners chose not to participate in the case;[32] a motion to dismiss was filed alleging inappropriate conduct on the part of the Commissioners;[33] evidentiary rulings by the regulatory law judge eviscerated the case of the opponents of the transaction;[34] and efforts by this Commissioner to overrule the regulatory law judge were rebuffed by others.[35]

The above irregularities suggest a need for closer scrutiny and deliberate efforts at gaining public trust in the Commission's final decision and insuring all parties are afforded due process.

"DO THE SYNERGY SAVINGS ADD UP?"

The applicants have the burden to prove that this transaction is not detrimental to the public interest. On a purely financial level, lack of detriment can be established by estimated savings or cost reductions that can be realized from the transaction. Achievable synergies are the prize for both shareholders and ratepayers who both bear the risk of the transaction. For shareholders, savings may result in lower costs and improved earnings during periods of regulatory lag, and for ratepayers, cost reductions may trickle down in the form of lower utility rates, following the next rate case. To show lack of detriment on a financial basis, one must, at the very least, establish that the likely savings from the acquisition will be greater than the costs of the transaction and implementing the transition. Allegations of synergy savings must be carefully scrutinized to identify realistic, reliable and achievable forecasts of cost reductions and exclude inflated figures or unrealistic estimates. The applicants have the burden of identifying prioritized

[30] *1d.*
[31] Letter to Counsel, April 23, 2008; Statement of Dissent to Waiver of Conflict of Interest, April 30, 2008.
[32] Notice of Recusal, December 6, 2007; Notice of Recusal, April 24, 2008.
[33] Motion to Dismiss, December 14, 2007; *but see* Commissioner Clayton's Opinion and Response to Public Counsel's Motion to Dismiss, January 2, 2008.
[34] Report and Order, pp.18-30, July 1, 2008.
[35] Statement in Dissent to Regulatory Law Judge's Evidentiary Ruling and Objection to Procedural Irregularity, May 13, 2008.

integration plans with estimates of the likelihood of achieving synergies. One cannot assume that savings will easily flow from the integration of two separate and different corporate entities. In fact, synergy savings are not automatic and in electric utility merger cases, synergy savings of 10% are simply not achievable after the period of integration.[36] If savings are unlikely, inflated or unachievable, the known costs of the transaction may doom the merger or acquisition with none of the parties realizing any benefit and potentially suffering harm through higher rates and costs. Such a transaction could then be described as detrimental to the public interest.[37]

The applicants propose synergy savings of $305 million to be realized within five years while $755 million in savings will be achieved within ten years. These figures were then adjusted to be Missouri-specific for the first five years in the amount of $222 million and a ten year estimate of $549 million.[38] The majority accepted as true that every dollar of savings suggested by the applicants would be achieved and the Report and Order goes to great lengths to endorse and support these alleged synergy savings. The witnesses supporting these allegations are the same hired experts who have collectively charged $9 million, an amount that far exceeds the entire annual budget of the OPC ($880,809) and exceeds 69% of the entire annual PSC utility budget ($12,987,109).[39]

In contrast, the opponents of the transaction presented compelling evidence and arguments questioning these proposed savings. Staff argued primarily that the applicants did not file their case properly or supply the necessary information to conform with section 393.190, RSMo. 2005. Staff additionally argued that even if the application did not violate section 393.190, RSMo 2005, in any event, "merger savings cannot be accurately measured,"[40] because there is no foolproof manner to track savings over the course of multiple years due to changing costs, modified fuel expenditures and varying staffing levels and pay gyades.[41] A subsequent audit cannot identify savings leaving the Commission unable to offset the identifiable "transaction costs" or "transition costs," which are known

[36] Exh.300, p.4 (Brubaker Rebuttal).
[37] Tr. 7:1036.
[38] Exh. 37, p. 3 (Bassham Additional Supplemental Direct).
[39] Tr. 21:2896-2897; *see also* Staff Post-Hearing Brief, p. 84.
[40] Exh. 100, Staff Report, p.46.
[41] *Id.* at 46-48.

and measurable. Given that the bulk of savings are not anticipated until the year 2013, 2018 or beyond, that the staff members conducting the audit will most likely be different and the fact that most, if not all, of the current Commissioners will no longer be serving, the lack of continuity and institutional knowledge may further cloud future evaluations of this transaction.

The staff further found the manner in which synergies were calculated focused on achieving a financial result to justify the transaction rather than having a prioritized and realistic plan for a successful integration, for maintenance of high standards of customer service and maintenance of reliable utility service.[42] The applicants' savings goal was pegged to support the costs of the original transaction, which ranged from $397.15 million up to $466.15 million.[43] Further, because the synergies were identified without a comprehensive plan of integration, without a joint operating agreement, without a plan of integration with specific goals to accomplish, items prioritized with likelihood of success and without a request for Commission permission for those specific plans of merger, that the savings estimates were simply not credible. Staff argued that a more specific and detailed application with proposals for merger and accompanying plans of integration would have enabled the staff to more completely assess the proposed synergies.[44]

Other opponents to the transaction, including the OPC and the Industrial Intervenors, argued that many of the estimates were speculative and simply not supported by adequate analysis. Staff and OPC witness, Dittmer, both categorize the estimated synergy savings as "overstated."[45] The Industrial Interveners' witness, Brubaker, warns, "given the aggressive nature of Applicant's synergy claims, it would not be wise to decide this case based on the assumption that these claimed savings are certain to be realized."[46]

The transaction opponents identified specific examples of alleged savings that warranted rejection.[47] The largest category of savings was argued to be "supply chain modifications, implementation of 'best practices' and 'strategic sourcing' that, in April 2007, were

[42] Tr. 23:3049.
[43] *See* n. 28, *supra.*
[44] Tr. 23:3078-9.
[45] Exh. 100, Staff Report, p. 1 I; Exh. 200, p. 5 (Dittmer Rebuttal NP and HC Versions).
[46] Exh. 300, p. 11 (Brubaker Rebuttal).
[47] Exh. 18, pp. 18-19 (Kemp Supplemental Direct).

estimated to achieve $50 million in savings.[48] Curiously, the applicants updated their estimates with an August filing asserting that they would achieve more than $131 million of the same category of savings.[49] This additional $81 million is an increase of 261.8 % and makes up over 59% of the total proposed five year synergies identified. The applicants asserted this connection without adequate support as they failed to identify a single vendor as the source of such savings.[50]

Additionally, the transaction opponents argued that certain savings could be accomplished by two independent companies without any merger or acquisition. OPC witness Dittmer identified $59 million in alleged "savings" that are not dependent upon consummation of the merger,[51] including Sibley facility improvements ($17 million), combining CT operations ($3.1 million), improving Aquila's heat rate in certain generation facilities ($600,000), improving KCPL boiler tube reduction ($5.6 million), Sibley facility boiler cleaning ($1.6 million), implementing KCPL energy efficiency measures ($13 million), improving Aquila's billing practices $12.8 million) and installing Automated Meter Reading equipment for Aquila ($5 million). With the exception of the estimate of energy efficiency programs, all of the others can be accomplished without the proposed transaction by two independent utilities.[52]

The applicants boast that each entity brings a unique and effective way of dealing with a number of operations enabling these savings. If the Commission authorizes the companies to recognize these "best practices" that should have been available to all Missouri utilities, it is making a finding of the prior rates being imprudent. That is, all utilities in the state should implement the same practices to achieve a lower cost in their operations. "Best practices" should be available to all utilities through some sort of roundtable discussion to allow for their implementation without the risk that comes with a merger or acquisition.

There are savings identified by the applicants that are less speculative but carry other concerns or risks. The only certain figure of savings comes from the elimination of Aquila facilities and staff. The sale of Aquila's headquarters for $22 million will generate some savings.[53] The elimination of staff may raise $87 million in savings,

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[48] Exh. 30, pp. 11-12 (Zabors Direct).
[49] Exh. 31, p. 1 I (Zabors Supplemental Direct).
[50] Exh. 200, p. 5 (Dittmer Rebuttal NP and HC Versions).
[51] Exh. 200, Sch. 3RD-I (Dittmer Rebuttal NP and HC Versions).
[52] *Id.*
[53] *Id.* at 37-40.

however, the additional cost reductions through elimination of staff raises questions of planning and quality of customer service. The applicants plan to reduce the Aquila workforce by 1/3 or 355 employees on day one with an additional 56 employees eliminated in the first five years. These reductions amount to 411 employees terminated to achieve savings of $87 million. Additionally, customer service centers among the utilities will be reduced from five to two, potentially raising $11.5 million in savings.[54]

By accepting these proposals, without specific plans of implementation or allowances for problems in the transition, the majority assumes that these two companies with two different cultures will merge seamlessly — without any employee turmoil or impediments. The staff testified at hearing that such a bold plan without support ignores potential employee problems, differences in business culture, union employee integration, and how integration responsibilities will be allocated and shared by departing and remaining employees.[55] It also ignores potential increases in salaries and costs of equipment and office space for employees taking on tasks associated with the integration as well as the increased tasks that will remain with the entity having twice the number of responsibilities.[56]

Because of these reductions, quality of service may suffer and, in response, new costs may be incurred to avoid violation of PSC quality mandates. Closing 60% of the customer service centers and implementing automated meter reading for 310,000 to 330,000 Aquila customers may lead to problems requiring attention by utility staff.[57]

To justify the transaction on a purely financial basis, savings must, at a minimum, exceed the costs of the transaction. The parties agree that the known acquisition "transaction costs" amount to $47.2 million, which include costs like experts, attorneys, financing costs and

[54] Staff Post-Hearing Brief, p. 65 (citing Exh. 31, pp. 10, 14 and Sch. RTZ-9 (Zabors Supplemental Direct) and Tr. 7:1121-1122, 9:1310).
[55] Tr. 23:3072-3074.
[56] Exh. 100, p. 37-40 (Dittmer Rebuttal NP and IIC).
[57] *See Staff of the PSC v. Laclede Gas Co.,* Case Nos. GC-2006-0318 & GC-2006-0431. The case addressed quality of service issues associated with implementation of Automated Meters. In *the* Matter of *Atmos Energy Corporation's Tariff Revision Designed to Consolidate Rates and Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of the Company,* Case No. GR-2006-0387. This case addressed quality of service issues involving call center consolidation.

other professional fees.[58] In addition, GPE/KCPL requests that the "transition costs," which are "necessary" to integrate the companies and lead to the synergy savings, be recoverable in the amount of $42.8 million. "Transition costs" allegedly represent costs such as third-party costs to support the integration from legal, Human Resources, Information Technology and process integration perspectives.[59] At a minimum, these synergies must produce savings of over $90 million to justify the transaction.[60]

The savings are speculative and cannot be tracked while the costs are certain. The applicants cannot carry their burden that the transaction is not detrimental to the public interest.

CUSTOMER SERVICE

Today, Aquila and KCP L both have acceptable call center performance and Aquila has been identified as having the superior customer service operation of the two.[61]

Merger savings are usually found through reductions in staff and facilities leading to the potential for a decline in service quality for customers. If customer service declines, this is a non-financial detriment to the public interest and it must be considered. Customer service standards should remain the same or be increased rather than permit the applicants to reduce their current standards and merely meet minimal service quality metrics.

The Staff Report cites the merger of Southern Union Company (MGE) and Western Resources Inc.'s Missouri gas properties as a past merger where customer service deteriorated resulting in a detriment to the public. Following the merger in 1994, MGE, staff and OPC opened a docket to investigate the billing and customer service practices of the merged company. In 1995, that investigation resulted in 37 recommendations being presented to the management of MGE. During 1996, complaints reported to the Commission's Consumer Services Department increased by approximately 75% over those reported prior to the merger. Customer

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[58] All figures are Missouri-jurisdictional amounts adjusted to reflect costs and savings for Missouri ratepayers.

[59] Exh. 31, p. 15 and Sch. RTZ-11 (labors Supplemental Direct).

[60] *See also* n. 28. The applicants' current proposal requests inclusion in rates of "transaction costs," for $47.2 million and "transition costs," valued at $42.8 million.

[61] Exh. 100, Staff Report, p.70, 72-76.

service declined to the point that staff and OPC filed complaints against the utility. Many factors were identified as causing MGE's service problems from workforce reductions to high rates of employee turnover.[62]

While staff acknowledges that the performance of one utility following a merger does not necessarily mean the same will happen following another merger, this example cannot be ignored. Like with the present merger application, both utilities in the prior case had solid records of good customer service and both argued that customer service would not be a problem following the merger of the two companies.[63] Despite those plans, the surviving utility still encountered significant problems in customer service following the consummation of a merger.[64] Based on the fact that, collectively, staff has been involved in more than 24 merger cases, it has the experience to identify and avoid those problems.[65] The majority chose to ignore this experience and discredit the testimony of the career staff.

The applicants propose continuing to serve KCPL and Aquila's customers and to provide transitional services to Black Hills while terminating 1/3 of Aquila's workforce. The proposed transaction lacks serious planning and controls to ensure that the disruption to service quality is minimized. It seems improbable that a consolidation of service centers, termination of 411employees and a merger of separate entities with different processes, practices and workforces will occur without tremendous disruption to service quality. This Commissioner cannot endorse a proposal to enable the customer service quality of these two companies to deteriorate.

Unfortunately, if customer service declines, the Commission will be faced with the prospect of either sanctioning poor service, authorizing higher rates to prop up the level of service or imposing penalties without an increase in rates to punish the utilities.

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[62] *Id.* at 72.
[63] *Id.; In The Matter Of The Joint Application Of Western Resources, Inc., D/B/A Gas Service, A Western Resources Company, A Kansas Corporation And Southern Union Company, D/B/A Missouri Gas Energy, A Delaware Corporation, For An Order Authorizing The Sale, Transfer And Assignment Of Certain Assets Relating To The Provision Of Gas Service In Missouri From Western Resources, Inc. To Southern Union Company, And In Connection Therewith, Certain Other Related Transactions,* Case No. GM-94-40. William E. Brown Direct, p. 4, and Eugene N. Dubay Direct, p. 9.
[64] Tr. 23:3051.
[65] *See* nn. 47 and 50, *supra,* and nn. 63-67, *infra.*

Once again, the focus of the applicants should have been on the customer service rather than on the accounting benefits.

IS THIS GOING TO HURT MY CREDIT?

Much of the testimony in this case revolved around estimates and expectations of how the credit markets would view the companies' post-merger credit. Rating agency opinions were filed as exhibits and arguments were made suggesting either the alleged strength or weakness of GPE/KCPL and Aquila. This Commissioner believes that the Commission will be facing this issue again in the future when GPE/KCPL returns for financial help.

As reflected in note 28 above, the applicants' original proposal included a number of beneficial rate making provisions that were contemplated while the case was being prepared. These requests were valued at $397.15 million up to $466.15 million, and, if approved, would have been added into customer utility rates. The boards of both companies considered these requests when deciding on a purchase price of Aquila shares. Credit rating agencies such as Standard and Poor's and Moody's took into account these assumptions when drafting their credit outlooks for the post-merger companies.[66] While this Commissioner does not endorse those rate making requests, they would have helped maintain or improve many positive financial metrics in evaluating the credit worthiness of GPE/KCPL.

Even with the favorable rate making provisions, staff warned that such a transaction would hurt GPE/KCPL's credit rating and began its report by stating:

> GPE does not have the financial strength to acquire Aquila and absorb Aquila's financial difficulties without seriously weakening GPE's financial condition. GPE's acquisition of Aquila will weaken

KCPL's financial condition at a time when KCPL is committed to significant capital expenditures. When the GPE acquisition of Aquila

[66] *See* Exh. 8, Schs. MWC-4 (HC) & MWC-5 (HC) (Cline Direct).

was announced on February 7, 2007, Standard & Poor's placed KCPL's debt ratings on CreditWatch with negative implications.[67]

However, such rate making treatment was not awarded or even requested by GPE/KCPL in the final, amended proposal. Many of the assumptions supporting the original transaction and the credit rating agency opinions are no longer present. The absence of those provisions will leave GPE/KCPL to absorb Aquila's higher debt costs ($120 million), absorb the transaction costs ($47.2 million), abandon any up front allocation of estimated synergies ($129.85 million) and the order will not include any specific request or grant of "additional amortizations" beyond what GPE/KCPL already has been granted, valued between $45 and 114 million.[68] While as of this date, GPE/KCPL have not been adversely affected by lowered credit ratings, this company may very well be in danger of lower credit worthiness, causing higher debt costs and placing in jeopardy necessary financing to complete its commitments in the CEP. Subsequent opinions from credit rating agencies continue to make assumptions apart from what the majority ordered.[69] OPC witness, Dittmer, offered competent testimony that if the estimated synergy savings are not achieved in a timely fashion, this proposed transaction may lead to a credit-rating downgrade for KCPL:

> We are paying above traditional cost of service rates just to keep the credit rating acceptable, and now we are exposing that credit rating to a downgrade through this purchase through the other costs — if the company is not allowed to recover all the costs that they were asking for in this case or in the next rate case where they do ask for regulatory amortization on the Aquila side (sic).[70]

[67] Exh. 100, Staff Report, p. 1.
[68] *See* n. 28.
[69] Exhs. 124 (HC) and 125 (HC).
[70] Tr. 13:1680.

This Commissioner believes that the majority recognizes this concern and attempts to protect ratepayers with conditions disallowing transaction costs and allocating all increased debt costs caused by credit downgrades as shareholder obligations. While this is a laudable goal, it will actually lead to additional financial burdens on GPE/KCPL that could lead, in turn, to a worsening of credit and higher costs without the ability to recovery in rates. This potential downward spiral may occur at a time when GPE/KCPL are in the midst of significant capital projects. The Commission was already assisting GPE/KCPL with beneficial amortizations and the company decided to spend more money to buy another utility.

The Commission cannot ignore other decisions that shed light on GPE/KCPL's credit worthiness. Recently, GPE/KCPL sold its unregulated business Strategic Energy, for $300 million.[71] GPE/KCPL suspended its plan of investing in additional wind generation because of adverse conditions in financial markets.[72] The company has also delayed or suspended Phase 2 of the La Cygne capital project originally part of the CEP and it will not be completed until 2011.[73] While these steps may improve the short-term viability of the utility, they cannot hide the uncertainties in financial markets or the cash flow obligations of the company. Lastly, this Commissioner believes that the Commission should be mindful that as GPE/KCPL nears the end of its CEP, that another CEP may be in store for GPE/KCPL/Aquila customers. Additional projects and needs for credit quality may lead to further negotiations for "additional amortizations" in a future CEP.[74] Unfortunately, much of the testimony related to this topic was ruled inadmissible by the regulatory law judge and will be unavailable to a reviewing court.

The result of these questionable financial circumstances may lead to GPE/KCPL returning to the Commission for "regulatory support" to address credit downgrades and the higher debt costs from lesser credit ratings. Because of the majority order endorsing this acquisition or merger; it will be hard for the Commission to deny such beneficial rate

[71] Tr. 25:3163; Exhs. 136 and 137.
[72] *See Application of Kansas City Power & Light Company for the Opening Of A Proceeding To File Status Report On Wind Investments,* Case No. EO-2008-0224, Application and Status Report on Wind Investments, January 4, 2008.
[73] Exhs. 123, 138 and 139.
[74] Exh. 139, p. 10.

making treatment as the Commission may be blamed for approving the transaction. This transaction could be the beginning of a cycle that involves the Commission and the post acquisition companies attempting to protect the companies' financial integrity. This risk to these companies, to the shareholders and to the ratepayers cannot be ignored and it certainly illustrates a potential detriment to the public interest.

NOW IS NOT THE RIGHT TIME

At this time, staff argues that these two companies are stronger standing alone rather than together. The two utilities appear to be on contradictory cycles, Aquila on the rebound while KCPL is facing significant financial challenges. Aquila is on track to improve its credit rating without this transaction sometime in 2010-2011.[75] Aquila's higher debt costs will mature and may lead to lower debt costs at that time.[76] Furthermore, KCPL should complete Iatan 2 and most of the accompanying environmental projects sometime in the same time period allowing for those costs to be added to rate base and included in rates. As KCPL nears completion of this CEP, as it seeks authorization to place these assets in rate base and as the Commission authorizes the corresponding higher rates, the Commission will no longer be faced with granting special treatment through "additional amortizations."

Rather than wait until 2011-2012 when both companies are on stronger financial footing, this transaction will weaken KCPL's financial condition by consolidating it with a weaker Aquila during a time of significant construction costs. This is not a risk worth taking. In the near future, many of the contentious issues will no longer be relevant and Missouri may well have two relatively strong utilities with headquarters in the western side of the state. Two separate utilities would attract capital with Commission mandated focus on consumer service rather than merger-related cost savings. Risk would be spread among two entities with two sets of shareholders and ratepayers rather than all of the risk being borne by one.

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[75] Tr. 4:408-409, 411-412.
[76] Tr. 4:432.

GPE/KCPL's share of the capital projects are estimated at $1.3 billion.[77] According to this CEP, the years 2008 and 2009 require the highest amount of cash outlays. During the same time period, GPE/KCPL will be spending more than $1.7 billion to buy out Aquila shareholders.[78] GPE/KCPL argued during the hearing that their pending requests for additional amortizations were abandoned, but that they reserved the right to return in future cases to make such a request. The Commission must be mindful that if the acquisition or the construction projects do not work out as anticipated, more "additional amortizations" with higher rates may be necessary. Now is not the time for this transaction.

THIS IS NOT THE STAFF'S FIRST MERGER AND ACQUISITION CASE

The majority makes findings which discredit the testimony of opponents of the merger application. The Report and Order dismisses the format of the staff testimony, staffs experience, staff's criteria for approving mergers and dismisses the staff's consistent approach to merger or acquisition cases during the past thirty years.[79] Staff's

[77] *Id.*
[78] Exit I, p. 8 (Basstiani Direct).
[79] *In The Matter Of The Joint Application Of The Utility Companies Comprising Union Electric System For Permission And Authority (I) To Merge Missouri Utilities Company, Missouri Power & Light Company And Missouri Edison Company With And Into Union Electric,* Case No. EM83248xxxxx01; *In The Matter Of The Application Of The Kansas Power And Light Company And The Gas Service Company For Authority Of The Commission Pursuant To Section 393.190 RSMo. 1978 (i) To Merge The Gas Company With And Into The Kansas Power And Light Company And (ii),* Case No. GM85186xxxxx01; *In The Matter Of The Application Of Utilicorp United Inc., A Missouri Corporation ("Utilicorp Missouri") And Utilicorp United Inc., A Delaware Corporation ("Utilicorp Delaware') For Authority To Merge Utilicorp Missouri With And Into Utilicorp Delaware A,* Case No. EM8726xxxxxx01; *In The Matter Of The Application Of The Raytown Water Company For Authority To Reorganize Through Corporate Merger,* Case No. WM8730xxxxx01; *In The* Matter *Of The Joint Application Of Arkansas Power & Light* Company *("AP&L"), Associated Natural Gas Company ("ANG") And Arkansas Western Gas Company ("AWG") For Approval Of The Acquisition Of AP&I.'s Interest In ANG By AWG To Be Effected By A Merger,* Case No. GM88100xxxxx01; *In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service (Utilicorp), A Delaware Corporation, The Liberal Gas Company (Liberal), A Kansas Corporation, And Seward County Gas Company (SCGC), A Kansas Corporation,* Case No. GM89112xxxxx01; *In The Matter Of The*

Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service, A Delaware Corporation, And Michigan Energy Resources Company, A Michigan Corporation, For Approval Of The Merger Of MERC With And Into Utilicorp, Case No. GM89151xxxxx01; *In The Matter Of The Application Of United Cities Gas Company For An Order* Authorizing *The Acquisition And* Merger *Into It Of* Union Gas *System, Inc.;* Authorizing *The Issuance Of $15,000,000 Principal Amount Of First Mortgage Bonds, Series R, 11.32%, Due,* Case No. GM9062xxxxx01; *In The Matter Of The Application Of Greeley Gas Company, A Delaware Corporation, For An Order Authorizing The Merger Into It Of Greeley Gas Company, A Colorado Corporation, And Standard Gas Supply Corporation, A Colorado Corporation,* Case No. G1V191355xxxxx01; *In The Matter Of The Merger Of GWC Corporation With And Into United Water Resources Inc. And The Indirect Acquisition By United Water Resources Inc. Of More Than Ten Percent (10%) Of The Total Capital Stock Of Capital City Water Company,* Case No. WM94191xxxxx01; *In The Matter Of The Joint Application Of Vogel Sewer System Inc. And West Elm Place Corporation For An Order Authorizing The Merger Of Vogel Into West Elm, With West Elm Being The Surviving Corporation, And For Approval Of Related Tariff Changes,* Case No. SM95144xxxxxx01; *In The Matter Of The Application Of Greeley Gas Company, A Division Of Atmos Energy Corporation And OHGC Acquisition Corporation For Authority To Merge With Oceana Heights Gas Company And For Authority Of Atmos Corporation To Issue And Sell Up To 400,000,* Case No. GM9618xxxxx01; *In The Matter Of The Application Of Union Electric Company For An Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer Of Certain Asssets, Real Estate, Leased Property, Easements And Contractual Agreement,* Case No. EM96149xxxxx01; *In The Matter Of The Application Of United Cities Gas Company, An Illinois And Virginia Corporation, For An Order Approving The Merger Of Monarch Gas Company, An Illinois Natural Gas Utility, With And Into United Cities Gas Company,* Case No. GM96180xxxxx01; *In The Matter Of The Joint Application Of Atmos Energy Corporation And United Cities Gas Company For An Order Authorizing Atmos Energy Corporation And United Cities Gas Company To Merge, With Atmos Energy Corporation Being The Surviving Corporation,* Case No. GM9770xxxxx01; *In The Matter Of The Application Of Southern Union Company For Authority To Acquire 854,300 Shares Of Atmos Energy Corporation Upon The Merger Of Atmos Gas Corporation And United Cities Gas Company,* Case No. GF97194xxxxx01; *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power & Light Company For Approval Of The Merger Of Kansas City Power & Light Company With Western Resources, Inc. And For Other Related Relief* Case No. EM97515xxxxx01; *In The Matter Of The Merger Of American Water Works Company With National Enterprises, Inc. And The Indirect Acquisition By American Water Works Company Of The Total Capital Stock Of St. Louis County Water Company,* Case No. WM99224xxxxx01; *In Re: Merger of Cedar Hill Estates Water Company, Inc. into KMB Utility Corporation,* Case No. WM-2003-019410; *In The Matter Of The Transfer Of Assets, Including Much Of Southern Union's Gas Supply Department To Energyworx, A Wholly Owned Subsidiary,* Case No. GO-2003-035424; *In The Matter Of The Transfer Of Assets Of Hillcrest Utilities Company From Blomeyer Investments, Inc. To Brandco Investments, LLC.,* Case No. WM-2007-026110; *In The Matter Of The Transfer Of Assets Of Hillcrest Utilities Company From Blomeyer Investments, Inc. To Brandco Investments, LLC.,* Case No. SM-2007-026210; *In The Matter Of The Joint Application Of Great Plains Energy Incorporated, Kansas City Power & Light Company, And Aquila, Inc. For Approval Of The Merger Of Aquila, Inc. With A Subsidiary Of Great*

involvement in over twenty major electric, gas, water or sewer company merger cases has led to a thorough and thoughtful approach to reviewing such transactions. Some of those merger or acquisition cases have been resolved through settlements while others have been opposed.[80] Some of those past cases have involved Aquila,[81] while others have involved KCPL or Great Plains,[82] while others, still,

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Plains Energy Incorporated And For Other Related Relief Case No. EM-2007-037410; *In The Matter Of The Transfer Of Assets Of Swiss Villa Utilities, Inc. To The Black Oak Mountain Resort Property Owners Association,* Case No. WO-2007-041024.

[80] Tr. 23:3080-1.

[81] *In The Matter Of The Application Of Utilicorp United Inc., A Missouri Corporation ("Utilicorp Missouri") And Utilicorp United Inc., A Delaware Corporation ("Utilicorp Delaware") For Authority To Merge Utilicorp Missouri With And Into Utilicorp Delaware A,* Case No. EM8726xxxxxx01; *In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service (Utilicorp), A Delaware Corporation, The Liberal Gas Company (Liberal), A Kansas Corporation, And Seward County Gas Company (SCGC), A Kansas Corporation,* Case No. GM89112xxxxx01; *In The Matter Of The Joint Application Of Utilicorp United Inc., D/B/A Missouri Public Service, A Delaware Corporation, And Michigan Energy Resources Company, A Michigan Corporation, For Approval Of The Merger Of MERC With And Into Utilicorp,* Case No. GM89151xxxxx01; *In Re UtiliCorp United, Inc. and St. Joseph Light & Power Co for authority to merge.,* Case No. EM-2000-0292; *In Re UtiliCorp United, Inc. and The Empire District Electric Co. for authority to merge,* Case No. EM-2000-0369.

[82] *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power & Light Company For Approval Of The Merger Of Kansas City Power & Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM97515xxxxx01; *In The Matter Of The Application Of The Kansas Power And Light Company And The Gas Service Company For Authority Of The Commission Pursuant To Section 393.190 RSMo. 1978 (i) To Merge The Gas Company With And Into The Kansas Power And Light Company And (ii),* Case No. GM85186xxxxx01; *In the Matter of the Application of Kansas City Power & Light Company for Approval of its Acquisition of All Classes of the Capital Stock of Kansas Gas and Electric, to Merge with Kansas Gas and Electric and to Incur Debt Obligations,* Case No. EM-91-16; *In The Matter Of The Application Of The Kansas Power And Light Company And KCA Corporation For Approval Of The Acquisition of All Classes of the Capital Stock of Kansas Gas and Electric Company, to Merge With Kansas Gas and Electric Company, To Issue Stock, and Incur Debt Obligations,* Case No. EM-91-213; *In the Matter of the Application of Western Resources, Inc., For Approval of Its Proposal To Merge With Kansas City Power & Light Company, and Other Related Relief* Case No. EM-96-371; *In the Matter of the Application of Western Resources, Inc., For Approval of Its Proposal To Merge With Kansas City Power & Light Company, and For Other Related Relief* Case No. OA-96-371; *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief* Case No. EM-97-515.

involved previous attempts at a merger between the two.[83] Some of the mergers were successfully completed while others were abandoned. This is not staff's first "merger" case and its analysis should be given much more deference than the majority allows.

The majority questions the format of the Staff Report, which was compiled by a division director who has been employed by the agency for 31(+) years. The format was also the product of Commission direction after Commissioners expressed concerns over disorganized pieces of testimony involving many different divisions and employees.[84] The author's credibility was attacked for not preparing testimony in prior merger cases yet he participated in past merger cases at various levels, most notably in a supervisory capacity.[85] The majority questioned whether he wrote the Report yet he took responsibility and credit for all aspects of the Report aside from the legal conclusions that provided support to staffs position.[86]

Further, the Staff Report has greater credibility because it assures an orderly, efficient and customer service-focused integration, instead of focusing on financial incentives unrelated to customer service. Staff argued that the applicants deviated from past Commission practice and erred in how its case was pleaded and organized.[87] Also, staff expressed concern over the proposal's lack of detail in any specific plan of integration, joint operation plan, plans of dispatch and that without such planning; the applicants have left too much at risk for a successful merger.

> We have in essence these micro plans to do—consolidate different segments of KCP&L and Aquila. We don't have that pulled together. In fact, from the things I see is there's this day

[83] *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No. EM-96-245.
[84] *See* Attachment A*.
[85] Tr. 13:1806-1807.
[86] Tr. 13:1812-1816.
[87] Tr. 23:3063-65.

> one that they plan to start all the stuff or almost all the stuff on the day after they close on the transaction, and that's to me and the Staff, that's — that's not acceptable. I mean, the idea that you can do all that and not have a bunch of implementation issues is just-- . . .
>
> The scope of work that they want to do, but you're moving people, you're going to have work groups be consolidated, and they're going to have to be providing service because the customers aren't going to expect a different -- a different service on the day before the merger, or whatever you call this thing, and the day after, and you're going to have that kind of a shift.
>
> Plus people are learning. You know, when you're moving people, just your normal sources of information and stuff, they're disrupted, you know, and you're going to have a -supposedly you have a significant reduction in the work force, so people that I normally could go to and talk to one day are now gone. I'll now be working with another group of people that, you know, I may know them but I don't know them very well. I certainly don't know them in a work setting yet, that I'm going to have that all happen.
>
> Those are the types of things that, using a term that seems in vogue now be vetted, that that's -- that that is the level of what I would say if you're really going to move into execution and implementation, you've got to get down to that level of people involvement and stuff, and then looking at -- knowing that things are not going to work the way you want. I mean, you're going to run into people problems. You're going to run into vendor problems.[88]

The staff found the transaction as proposed to be "high-level" and unrealistic in "Day One" implementation raising significant questions of

[88] Tr. 3041-3043.

whether the transaction will be a success.[89] The applicants failed to supply a plan that identifies priorities and goals of integration with assessments of likelihood of savings or success.[90] The analysis of integration, satisfying quality of service and savings that would result, should lead to a more reasonable purchase price.

At the hearing, staff was questioned about other tangible or intangible factors that should be evaluated when determining whether the transaction is detrimental to the public interest. These factors go beyond mathematical analysis of simply reviewing alleged savings against costs of the integration or merger. Staff argued that while there are a few perceived benefits including the increase in size of the company achieving increased economies of scale, and benefits of adjacent service territories; the staff found many negative factors including the questionable financial status of the post-merger utilities, potential for a clash of employee cultures, disruptions in service because of staff departures, resentment among remaining staff, loss of the ability to have two separate entities fighting for capital in the marketplace, rather than one, and the consolidation of risk placed on a single entity rather than spread among several utilities for large capital projects (such as ratan 2).[91] Further, staff did not believe that any leadership changes at either utility post-merger suggested a benefit or a detriment to the public interest.[92]

This Commissioner disagrees with how the majority criticizes the transaction opponents for not performing certain analysis or providing additional updates to their evidence. The applicants filed their case in April 2007 and then modified the proposal in August 2007.[93] Then, following the unique continuance granted during the first evidentiary hearing, the applicants filed yet another amended proposal with different requests. The majority chose to blame the opponents for not filing testimony in a certain way and it fails to find any fault on the part of the applicants for unilaterally delaying the case, for oddly asking for leave to modify their proposal or for getting a second evidentiary hearing within the same case after gauging the mood of regulators.

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[89] Tr. 3050.
[90] Tr. 3050.
[91] Tr. 23:3068-3078.
[92] Tr. 23:3070.
[93] KCPL Supplemental Direct Testimony and Schedules, August 8, 2007.

The opponents faced a moving target in terms of mounting a defense to the application, which raises due process concerns. Budgetary constraints also played a role in how the opponents chose to challenge the proposed merger. The OPC apparently could not afford to update its expert's testimony following the new proposal filed in 2008.[94] Applicant witnesses were compensated in the amount of $9 million, which is an amount significantly greater that the entire budget of OPC and more than 69% of the Missouri Public Service Commission budget.[95] The majority questioned the opponent witnesses' credibility for not performing a "bottom-up" review yet most of the opponents did not have the funds, the staff or the data to complete a comparable analysis in response.[96] Further, the majority did not address the inherent bias associated with such purchased expert testimony.

The majority should not have discarded the staff's analysis and it should have acknowledged staff's warnings of potential "public detriment."

OBJECTIONS: SUSTAINED

On April 16, 2008, the staff filed its second list of issues in preparation of the newly scheduled evidentiary hearing and, later that day, GPE/KCPL filed a Motion to Limit Scope of the Proceeding specifically identifying certain issues raised by staff that should be excluded from the evidentiary hearing.[97] Four principal issues were challenged and were subject to an evidentiary ruling of the regulatory law judge ("RLJ"). Those issues are summarized as

(1) An inquiry into four anonymous letters that, during the course of this proceeding, were directed to various Commissioners, either participating or not participating in this matter; the subject of which pertained to Applicant's (sic) financial ability to effectuate the proposed merger.

(2) An inquiry into the Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy.

[94] Tr. 13:1666, 1720, 1724-1725, 1767-1768.
[95] Tr. 21:2896-2897.
[96] Tr. 13: 1724-1725.
[97] Aquila did not join in this motion.

(3) An inquiry into a plan for regulatory "Additional Amortizations" that appeared in the Applicant's original application but was subsequently removed and is not being requested.

(4) An extensive inquiry into the KCPL's Comprehensive Energy Plan ("CEP") set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects.[98]

The evidentiary hearing was reconvened on April 21 and, pursuant to an Order of the RLJ, the staff and other parties responded to the motion on April 24. The RLJ issued his ruling from the bench on April 24, although the scope and exact content of the ruling were not available for review in written form until a day before the conclusion of the hearing. The majority adopted the decision of the RLJ and those findings are specifically set out in the majority Report and Order beginning on page 14.

This Commissioner believes that the RLJ's broad and far-reaching evidentiary rulings were in error. These rulings summarily excluded at least four categories of relevant issues, over fifteen potential witnesses and several weeks of scheduled testimony. The rulings misconstrue the type of evidence staff proposed and ignore specific examples of public detriment. The majority's definition of "not detrimental to the public interest" is narrowly drawn in a way that permits the majority to ignore many allegations of detriment beyond basic financial data or comparisons of costs and savings. Through its evidentiary rulings, the majority fails to recognize the implications of the transaction beyond how the applicants' framed the issues. Four days after the evidentiary hearing resumed in April, the staff learned that its evidence, obtained through a lawful and timely investigation, was to be excluded from the record. Unfortunately, these rulings occurred at a time when the transaction opponents had already modified their cases twice to address the applicants' evolving positions.

[98] Report and Order, p.15.

The Commission is an administrative agency associated with the executive branch and not part of the judiciary. It is subject to different rules of procedure and it is statutorily different in how it receives evidence. The General Assembly has directed that technical rules of evidence do not apply to Commission proceedings, which encourages the Commission to take a broad view of relevant evidence.[99] Additionally, the Commission acts without the assistance of a jury, which means that, like in a bench-tried case, it is able to sort through evidence and avoid relying on any evidence later found to be inadmissible.[100] Reviewing courts will presume that such a fact finder will not be influenced or prejudiced by any potentially inadmissible evidence.[101] While the fundamental rules of evidence apply to administrative cases, there is no question that they are relaxed in such proceedings.[102] Further, courts have delegated a certain amount of authority to administrative agencies because of their expertise in particular areas.[103] The Commission is well-equipped to sort through evidence in reaching a conclusion and it is illogical to assume that it is unable to hear evidence and balance its probative value versus its prejudicial effect.

Because of this expertise, this Commissioner agrees with the majority that the Commission is given wide discretionary latitude in admitting or excluding evidence and rendering findings of fact and conclusions of law. However, this Commissioner strongly disagrees with the majority's evidentiary ruling which runs "clearly against the logic of the circumstances . . . and is so unreasonable and arbitrary that the

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[99] §386.410, RSMo 2000.
[100] *State v. Anders,* 975 S.W.2d 462, 466 (Mo. App., W.D. 1998).
[101] *State v. Ernst,* 164 S.W.3d 70, 74-75 (Mo. App., S.D. 2005).
[102] *State ex rel. Church's Fried Chicken v. Board of Adjustment of the City of St. Louis,* 581 S.W.2d 861, 864 (Mo. App., E.D. 1979); *State ex rd. Bond v. Simmons,* 299 S.W.2d 540, 545 (Mo. App. 1957); *State ex rel. American Tel. & Tel. Co. v, Public Service Com'n,* 701 S.W.2d 745, 754-5 (Mo. App., W.D. 1985).
[103] *State Tax Cam* 'n *v. Administrative Hearing Com'n,* 641 S.W.2d 69, 74 (Mo. Banc 1982); *Love 1979 Partners v. Public Service Com'n of Missouri,* 715 S.W.2d 482, 490 (Mo. Banc 1986).

ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.[104] Unfortunately, the majority relies on the delegation of authority and it

> Seek[s] to avoid the fatal consequence of the evidentiary deficiency by the classic hue and cry of virtually limitless discretion possessed by the Commission, the admonition that courts should not substitute their judgment for that of the Commission, and the indulgence of deference for decisions of the Commission because of its expertise in the complicated and highly sophisticated matters it is legislatively ordained to resolve. Judicial recognition thereof when and where appropriate, however, does not dictate blind acceptance of every order cut and every decision handed down by the Commission. . . Unbridled bureaucracy is the subtle destroyer of people's rights . . .[105]

This Commissioner believes the majority made a significant mistake in how it disallowed this relevant and material evidence.

In ruling on the list of four issues, the majority ruled on each in the following

matter,

(1) Purported evidence regarding the anonymous letters is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.

(2) Great Plains Energy Code of Ethical Business Conduct and its gift and gratuity policy is wholly irrelevant to this proceeding and the Commission will not hear this purported evidence.

(3) While the Commission believes that any purported

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[104] *Cohen v. Cohen,* 178 S.W.3d 656, 664 (Mo. App., 2005).

[105] *State ex rel. Marco Sales, Inc. v. Public Service Corn 'n,* 685 S.W.2d 216, 220-221 (Mo. App., 1984).

evidence regarding a future plan for regulatory "Additional Amortizations" is irrelevant, it is not wholly irrelevant, and the Commission will preserve this evidence in the record as an offer of proof.

(4) An extensive inquiry into KCPL's CEP as set forth in the Stipulation and Agreement approved by the Commission in Case No. EO-2005-0329, including the current reforecast of cost and schedule issues related to the Iatan Unit 1 and Unit 2 construction projects is overly broad and the scope of any offered evidence in this regard will be restricted to: (1) The inter-relationship between the Iatan projects and Great Plains Energy's acquisition of Aquila; (2) KCPL's procurement function and asserted merger savings estimates; and (3) Credit agency debt rating information and debt ratings.

(5) The witnesses that the Applicant's (sic) have requested to be released in this matter will not be released to the extent they can provide testimony on the Applicant's credit-worthiness.

(6) Witnesses from Aquila that were to provide testimony solely on the issue of the anonymous communications are released and do not have to appear before the Commission.[106]

1. Anonymous Letters

This Commissioner wishes to be very clear. This Commissioner does not believe that the letters as unsigned, unsubstantiated documents containing hearsay or potentially double hearsay should be permitted as evidence, by themselves, as proof of the matter stated. These documents lack foundation and would not be subject to any cross examination. However, upon receipt of such anonymous letters, the Commission generally directs its staff to investigate the letters' allegations, pursuant to section §393.140, RSMo. 2005. In this case, the public has been led to believe that the staff would investigate and make findings.[107] It is the fruit of that investigation that led to the staffs proposals to call certain company witnesses to address concerns suggesting potential "detriment to the public interest." Staff argued that the issues selected were not "frivolous" and that the issues developed "after the evidentiary hearings in this case

[106] Report and Order, p. 18-19.
[107] "KCP&L Isn't Disclosing Cost Overruns of Plant Near Weston, Anonymous Letter Says," Everly, Steve, *Kansas City Star,* Feb. 14, 2008.

were suspended on December 6, 2007."[108] In fact, staff cites past experiences with anonymous letters which were received in association with Aquila. Following a thorough review of the allegations, staff summarized its findings in a report to the Commission. Aquila even welcomed the review and applauded the exoneration that came with it.[109]

This Commission has an obligation to fully investigate complaints and staff was prepared to move forward with evidence strictly limited to whether the merger was detrimental to the public interest. Instead of receiving and considering the evidence, the majority claimed it "wholly irrelevant" and excluded it. The majority cited a previously received anonymous letter in another KCPL financing case.[110] This Commissioner supported rejection of the letter but, unlike here, staff performed no investigation and it did not propose to present any substantial findings.[111] If one were to analogize, consider a criminal court case in which an anonymous allegation is made to the police. While the allegation itself would not be admissible at trial, the allegation would lead to an investigation that, in turn, would possibly lead to relevant and material evidence.

Any evidence found during the investigation of the anonymous letters with proper foundation and relevance to whether the transaction is "not detrimental to the public interest," should have been admitted, or at least heard in the record for the tribunal to consider. The finding of "wholly irrelevant" restricts the Commission's ability to receive the evidence and a reviewing court is without the record to render a decision. The majority mischaracterizes the staff's attempt to introduce the findings of its investigation that stemmed from the letters. Staff was not seeking to introduce the letters by themselves but as part of other evidence that would be established with proper foundation.

2. GPE Code of Ethical Business Conduct/gift and gratuity policy

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[108] Staff's Response In Opposition To Great Plains Energy's and KCPL's Motion To Limit Scope of the Proceeding To Whether Evidence Relating To Issues II Through IX of the Second List of Issues Is Not Detrimental To the Public Interest, April 24, 2008, p. 1.
[109] *Id.* at p. 4.
[110] Report and Order, p. 23.
[111] *Application of Kansas City Power and Light Company for Authority to Issue Debt Securities,* EF-2008- 0214.

The applicants' codes of ethics or practices are also relevant to this proceeding and the majority was incorrect in making a finding that such evidence is "wholly irrelevant." Adoption of different models of "best practices" are mentioned in support of the transaction. The applicants allege such "best practices" will lead to significant savings justifying the acquisition.[112] The staff identified its own "best practices" that should be adopted by GPE/KCPL. The staff argued that because GPE/KCPL's share of the capital program is now valued at over $1.3 billion,[113] Aquila's Code of Ethics and its gift/gratuity policy must be adopted. The staff argues that this is an additional example of why the transaction is "detrimental to the public interest." This stems from the fact that the acquisition will lead to a larger concentration of Iatan being owned and operated by the single company without the checks and balances from another stakeholder.

Much of the majority Report and Order addresses "best practices" when supporting the transaction. It is fundamentally unfair for the negatives or concerns of the transaction to be ignored. It is further unfair to the parties that this evidence was deemed irrelevant and completely excluded from the record.

3. "Additional Amortizations" and the CEP

What makes this case unique is the presence of the CEP and the "additional amortizations," that help fund it. The increased cash flows from the "additional amortizations" protect GPE/KCPL during completion of their construction projects. The CEP was the result of a carefully negotiated agreement among stakeholders. The parties acknowledged GPE/KCPL's need in constructing new generation facilities and the parties also understood the burdens GPE/KCPL faced in financing the projects. Prior to this agreement, no other utility had ever successfully reached such an agreement and, with the exception of Empire District Electric which has now successfully implemented its own regulatory plan, no other utility had benefited from the extra cash flow. The CEP is truly the first of its kind in recent Missouri history. In theory, the plant will be built and the company will be protected from adverse credit ratings.

[112] *See* Exhs. 18 (Kemp Supplemental Direct), 30 (Zabors Direct) and 31 (Zabors Supplemental Direct).
[113] Report & Order, ¶J 440, 442.

However, significant questions have been raised when the company opts to purchase another utility during such a time of difficult cash flows and sizable investment. While the applicants chose to not specifically ask for an award of "additional amortizations" in this case, they did not give up the opportunity to make such a request in future cases. The majority found this issue to be irrelevant, yet not "wholly irrelevant," and allowed limited testimony on the subject. But in its ruling, the majority fails to understand that GPE/KCPL are entitled to continue to seek the protection of "additional amortizations" during the life of this CEP, through 2010. GPE/KCPL may be entitled to additional cash flows if the CEP credit metrics reflect a downgrade in credit rating. Regardless of capital investment or whether they are purchasing another company, if KCPL/GPE's credit metrics fall below certain standards, the Commission will be asked to add in more cash to protect the utility. GPE/KCPL have already been awarded $21,679,061, which was added into rates in Case No. ER-2006-0314,[114] and $10,723,827, which was additionally placed into rates in Case No. ER-2007-0291.[115] Rate cases in 2009 and 2010 will contemplate additions to GPE/KCPL's revenue requirement. It also appears that Aquila will be permitted to ask for its own "additional amortizations" for its share of Iatan 2.[116] Unfortunately, most of the evidence on this topic was excluded.

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[114] *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan,* Case No. ER-2006-0314.

[115] *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Implement Its Regulatory Plan,* Case No. ER-20070291.

[116] Pending rate cases tiled by Aquila and KCPL, at this time, do not suggest requests for "additional amortizations," although parties' positions may change as the cases progress. *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Continue the Implementation of Its Regulatory Plan,* Case No. ER-20090089; *In the Matter of the Application of Aquila, Inc. dba KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service,* Case No. ER-2009-0090; *In the Matter of the Application of Aquila, Inc. dba KCP&L, Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Steam Heating Service,* Case No. HR-2009-0092.

Further, while "additional amortizations" are a relevant topic for the current CEP, they are also relevant to potential future CEPs.[117] "Additional amortizations" were designed to attract capital investment, to help build infrastructure and to prepare for future needs in the public service. It appears that this procedure is now being used for the strategic purchase of another utility. The Commission and the court should have the opportunity to review this material so that the transaction can be fully evaluated with future consequences in mind. While the parties were permitted to make a limited offer of proof associated with these issues, a great deal of testimony was excluded from the record.

Lastly, these rulings are inconsistent with prior evidentiary decisions in maintaining a broad view of relevant evidence. The industrial intervenors[118] sought to exclude evidence through a Motion In Limine of synergy savings because of how the case was pleaded. The Commission, including this Commissioner, rejected the Motion and ruled that it would take a broad view of relevant factors in sorting out its decision. These rulings go in the opposite direction by narrowly restricting what evidence comes before the Commission.

CONCLUSION

It is this Commissioner's sincere hope that this transaction is a success, that the synergies savings are achieved, that rates are reduced, that the integration is painless, that reliability is improved and that customers receive exceptional service. This Commissioner also hopes the shareholders financially benefit from the transaction. A successful merger with such results is definitely in the public interest.

However, many concerns have not been addressed suggesting significant challenges in the future. Mergers do not always work out. KCPL and Aquila have been involved in seven mergers cases in the last 18 years.[119] Four of those attempts failed for various

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[117] Exh. 138, p. 10. Mr. William Downey, CEO of KCPL, discusses the company's intentions to engage stakeholders for future CEP projects.

[118] Staff concurred in the Industrial Intervernors' Second Motion in Limine.

[119] *In The Matter Of The Application Of Kansas City Power & Light Company For Approval Of Its Acquisition Of All Classes Of The Capital Stock Of Kansas Gas And Electric To Merge With Kansas Gas And Electric, To Merge With Kansas Gas And Electric,* Case No. EM-91-16; *In The Matter Of The Application Of The Kansas Power And Light Company And KCA Corporation For Approval Of The Acquisition Of All*

reasons[120] while one of applications was approved only not to be pursued or consummated.[121]

Based on the above analysis, this Commissioner concludes that the applicants did not meet their burden of proving that the proposed transaction is not detrimental to the pubic interest. There is simply too much risk for all the stakeholders with limited potential benefit. This application, unfortunately, began as a ratepayer financed transaction with many guarantees and protections for the applicants, while also posing significant detriments to the ratepayers. Even now, with many of these items off the table, the Commission is left with the prospect of financially damaging all three applicants with a transaction that staff, OPC and others predict will face many difficult challenges ahead. With no concrete integration plans, a focus on

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Classes Of The Capital Stock Of Kansas Gas And Electric Company, To Merge With Kansas Gas And Electric Company, To Issue Stock, And Incur Debt Obligations, Case No. EM-91-203; *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No. EM-96-248; *In The Matter Of The Application Of Western Resources, Inc., For Approval Of Its Proposal To Merge With Kansas City Power & Light Company, And For Other Related Relief* Case No. EM-96-371; And *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief* Case No. EM-97515; *In Re UtiliCorp United, Inc. and St. Joseph Light & Power Co. for authority to merge,* Case No. EM-2000-292, *in Re UtiliCorp United, Inc. and The Empire District Electric Co. for authority to merge,* Case No. EM-2000-369.

[120] *In The Matter Of The Application Of Kansas City Power & Light Company For Approval Of Its Acquisition Of All Classes Of The Capital Stock Of Kansas Gas And Electric To Merge With Kansas Gas And Electric, To Merge With Kansas Gas And Electric,* Case No. EM-91-16; *In The Matter Of The Joint Application Of Kansas City Power And Light Company, Utilicorp United, Inc., And Kansas City United Corp., For An Order Authorizing Kansas City Power And Light And Utilicorp United, Inc. To Merge With And Into Kansas City United Corp., And In Connection Therewith, Certain Other Related Trans-Actions,* Case No, EM-96-248; And *In The Matter Of The Application Of Western Resources, Inc., For Approval Of Its Proposal To Merge With Kansas City Power & Light Company, And For Other Related Relief* Case No. EM-96-371; In *Re Utilicorp United, Inc. And The Empire District Electric Co. for authority to merge,* Case No. EM-2000-369.

[121] *In The Matter Of The Joint Application Of Western Resources, Inc. And Kansas City Power And Light Company For Approval Of The Merger Of Kansas City Power And Light Company With Western Resources, Inc. And For Other Related Relief,* Case No. EM-97-515.

savings rather than service, the distraction from complicated and difficult construction projects, the prospect of a credit downgrade and the likely possibility that the Commission will be expected to protect these companies in the future with higher ratepayer obligations, this Commissioner firmly believes that the application is detrimental to the public interest and must be denied.

For the foregoing reasons, this Commissioner dissents.

***Attachment A**: The minutes for January 26, 2007, and February 1, 2007 can be found in EFIS. The minutes were not published for formatting reasons.

SUNSHINE LAW REQUEST

TO: **Colleen M. Dale**
Secretary of the Missouri Public Service Commission

RECEIVED
FEB 0 1 2007

Adjudication Division
Public Service Commission

FROM: **David Woodsman**
DATE: **January 31, 2007**
RE: **Request for Memorandum Presented and Discussed at January 26, 2007PSC Agenda**

Pursuant to Section 610.023 RSMo 2000, I hereby request, on behalf of Praxair Inc., a copy of *all* memoranda, or other records or documents presented to the Commission and discussed at the

Commission's January **26, 2007 open meeting. It is my understanding that one portion of your memorandum contained a proposed rewrite of Chapter 2 of the Commission's rules. I have already received that proposed rewrite. As such, this Sunshine request seeks all memoranda and other records presented and discussed at the January 26 public meeting, excluding the Chapter 2 proposed rewrite.**

As required by Section 610.023.3, "each request for access to a public record shall be acted upon as soon as possible." "If access to the public record is not granted immediately, the custodian shall give a detailed explanation for the cause for further delay."

I would note that Section 610.027 provides the possibility of penalties, fines and attorneys fees in the event that access to such public record is not granted as soon as possible. Moreover, recent court decisions have indicated that this liability is *personal* to each individual agency member. Finally, I would note that it is the agency's responsibility to undertake a search for those documents It is not sufficient to merely question whether those documents have been "retained" by the Commission. Moreover, it is not appropriate to attempt to shield such documents from public review by claiming that the documents were retained by Staff employees, but not the individual Commission members.

Please contact me at 573-635-2700 when this record is available for inspection and copying or if you have any questions regarding this request or the legal obligations imposed on the Commission under a Sunshine Law Request. In order to avoid any delay, I will inspect at the Commission's premises.

Memorandum

To: Commissioners
Division Directors
From: Cully Dale
Date: January 25, 2006
Re: Process Improvements Brown Bag

The adjudication division has the following suggestions for streamlining the procedures for major cases. In addition, the Chapter 2 rewrite is attached, which embodies any changes necessary to accomplish these goals. The new Chapter 2 also incorporates other efficiencies and generally streamlines the language and requirements of the chapter.

1. Pre-filed Testimony.

a. If possible, make it shorter.

b. Put as much as possible in attached schedules. Particularly, experience and education should be in an attachment; discussion of previous commission positions, instructions or decisions should be in a separate attachment (if included at all).

c. Draft it in "issue" components. This makes it easier for the RLJ and Commissioners to put necessary materials for any given day of hearing and makes for easier reference when writing a decision, which is necessarily by issue.

d. Do a summary for the RLJ of each issue and the position on the issue. Experts tend to gear their testimony to the opposing experts, but the real audience is the group of people who will draft and decide the issues. If the witness cannot articulate his/her position and support therefore, the testimony is unusable. In addition, witnesses should clarify how the parties' positions relate to each other.

e. Always clarify your own position.

f. Save legal arguments and analyses for the briefs.

2. Briefs.

a. Make them shorter.

b. Cite case law, not previous Commission decisions. Always cite the Commission's authority to decide an issue, what the standard is and who has the burden of proof. Even if this is boilerplate, it needs to be there, in no more than two sentences.

c. Make a clear statement of what the issue really is, why it matters and what the Commission should decide. This includes arguments about potential ramifications.

d. Be exhaustive in the prehearing brief and cursory in the post-hearing brief. Use the post-hearing brief to bring the issues current (for example, noting settlement or compromise) and adding transcript cites.

e. Minimize the need to cross-reference.

f. Cite to the evidence. If the RLJ cannot find the supporting fact in the record, it will not be included in the order.

3. Cross-Examination.

a. If you have no questions, don't ask any.

b. Witnesses should answer leading questions: yes, no, maybe, sometimes or I don't know.

c. Lawyers should only ask leading questions on cross.

d. Lawyers should object immediately to all blather in the record (see b) and move to strike the extraneous verbiage.

e. Witnesses should be encouraged to be succinct and pointed in their responses to questions from the bench and during redirect. Long, rambling responses serve to confuse the bench, give the other side ammunition and muddy up the record.

4. Supplemental Filings.

a. All parties are always welcome to file proposed findings of fact and conclusions of law, and are free to not file them if they do not wish to do so. When the Commission asks for responses to particular questions, the bench is seeking information, not argument. Although parties are likely to file argument anyway, it is not a substitute for information.

b. Please point out bench mistakes soon enough and clearly enough for the RLJ to be able to fix them.

c. Weigh in on issues raised by other parties. The RLJs greatly appreciate responsive pleadings that direct them to the case or statute that disposes of the issue.

d. If the bench asks a question that is a non-sequitor, tell the bench so in no uncertain terms.

In the Matter of the Appointment of New Members to the Relay Missouri Advisory Committee

Case No. TO-2009-0023
Decided July 11, 2008

Telecommunications §1. The Commission appointed new members to represent the deaf, speech impaired, and hearing communities.

ORDER APPOINTING NEW MEMBERS TO THE RELAY MISSOURI ADVISORY COMMITTEE

The Relay Missouri Advisory Committee has nominated three individuals to fill vacant seats. Michael H. Boyd is employed by Paraquad, Inc., a St. Louis organization designed to provide independent living services for disabled individuals. Mr. Boyd is deaf and would fill the committee seat designed to represent the deaf community. Linda Baker is the Executive Director on the Missouri Governor's Council on Disability. Ms. Baker is speech impaired and would fill the committee seat designed to represent the speech impaired community. Barbara Garrison is hearing and is the Superintendent of the Missouri School for the Deaf. Ms. Garrison would fill the committee seat designed to represent the hearing community. The Committee respectfully requested the Commission to approve these appointments. At its July 8, 2008 Agenda Session, the Commission voted to approve the appointments.

IT IS ORDERED THAT:

1. Michael H. Boyd is appointed to the Relay Missouri Advisory Committee to represent the deaf community.

2. Linda Baker is appointed to the Relay Missouri Advisory Committee to represent the speech impaired community.

3. Barbara Garrison is appointed to the Relay Missouri Advisory Committee to represent the hearing community.

4. This order shall become effective upon issuance.

Colleen M. Dale, Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

In the Matter of Kenneth Jaeger and Blue Lagoon Sewer Corp.

Case No. SO-2008-0358
Decided July 15, 2008

Sewer §1. The Blue Lagoon sewer system was being run improperly, and as a result the evidence demonstrated that the sewer system had effectively been abandoned. The Commission found there was a clear and immediate need for the appointment of a receiver to ensure that the customers are able to receive safe and adequate sewer service. The Commission directed the General Counsel to petition the Circuit Court for an order attaching the Blue Lagoon sewer system.

REPORT AND ORDER

APPEARANCES

Christina Baker, Assistant Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102 For the Office of the Public Counsel and the Public.

Keith R. Krueger, Deputy General Counsel, P.O. Box 360, Jefferson City, Missouri 65102 For the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE: Morris L. Woodruff

Summary

This order directs the Commission's Staff to file a petition in circuit court seeking the appointment of a receiver to take charge of the sewer system owned by Kenneth Jaeger.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record,

makes the following findings of fact.

Procedural History

On May 1, 2008, the Office of the Public Counsel filed a motion asking the Commission to appoint an interim receiver to take charge of the Blue Lagoon sewer system located in rural Ralls County, Missouri. Public Counsel also asks the Commission to order its Staff to petition the Circuit Court to appoint a permanent receiver for that sewer system.

Public Counsel's motion alleges that Kenneth Jaeger, apparently doing business as Blue Lagoon Sewer Corp.,[1] is the owner and operator of the Blue Lagoon sewer system. Public Counsel asserts that Jaeger has filed for bankruptcy in Federal Court in Texas and has effectively abandoned the sewer system. Public Counsel warns that no provision has been made for the safe and adequate operation of that system.

On May 5, the Commission issued an Order Directing Response to Motion for Appointment of a Receiver and served it on Kenneth Jaeger by certified mail at his last known address in the state of Texas. Jaeger signed a receipt acknowledging delivery of that notice on May 16. The order directed Jaeger to respond to Public Counsel's motion no later than May 27.

Jaeger responded on May 21 by filing a handwritten letter indicating his willingness to transfer the sewage lagoon and spray area if such a transfer is approved by the bankruptcy court in Texas. Subsequently, on May 23, a letter was filed from Eduardo V. Rodriguez, a Texas attorney representing Jaeger in the bankruptcy proceeding, confirming that Jaeger is willing to execute an agreed motion to lift the automatic bankruptcy stay to transfer the sewer system to the Commission.

On May 29, the Commission issued an order scheduling a hearing on Public Counsel's motion. The hearing was convened on June 23. Jaeger and Blue Lagoon Sewer Corp. did not appear for the hearing. Public Counsel and Staff presented testimony in support of Public Counsel's motion.

The Services Provided by Jaeger

Public Counsel presented the testimony of Paul Dickerson, an Environmental Specialist employed in the compliance and enforcement

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[1] Public Counsel's motion asserts that Blue Lagoon Sewer Corp. is merely a fictitious company name used by Jaeger, as the Missouri Secretary of State's office has no record of a Blue Lagoon Sewer Corp. registered to do business in Missouri. Section 417.200 RSMo 2000 provides that it is unlawful to engage in or transact business in Missouri under a fictitious name without first registering the fictitious name with the Secretary of State.

section of the Missouri Department of Natural Resources. It is his responsibility to enforce the Missouri Clean Water Law.[2] Dickerson established that Jaeger has been operating a wastewater treatment system serving a rural area in Ralls County, Missouri.[3] Specifically, the sewer system serves the Lost Valley subdivision, as well as a commercial development including an RV campground known as Salt River Campground.[4] The area served is a recreational area located below the dam that forms Mark Twain Lake. It is not near any town.[5] The sewer system currently serves approximately 36 customers, at least some of whom have been billed for those services.[6]

The Blue Lagoon sewer system is designed to be a no-discharge collection system. Wastewater from the customer's homes or businesses is piped into a storage lagoon that is essentially a lake. The wastewater is stored in the lagoon until it can be sprayed over a grassy land-application field during the spring, summer, and fall months. Generally, the land-application cannot occur when the ground is frozen in the winter months. If the system is operated properly, the wastewater will be absorbed into the field and will not flow into and pollute any stream.[7]

Unfortunately, the sewer system is not being operated properly. The wastewater has not been pumped through the land-application system and as a result, the lagoon is over-full and is discharging wastewater over the emergency spillway into a creek. In addition, a lift station designed to pump water into the lagoon does not have a working pump and as a result, untreated sewage is being discharged into a stream before it even reaches the storage lagoon.[8]

Over the past several years, the Department of Natural Resources, represented by the Missouri Attorney General, has turned to the Circuit Court of Ralls County in an attempt to force Jaeger to bring the sewer system into compliance with the Missouri Clean Water Law. The Circuit Court of Ralls County has issued multiple orders directing Jaeger to take specified actions, but the system remains out of compliance.[9]

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[2] Transcript, Page 9, Lines 1-8.
[3] Transcript, Pages 10-11, Lines 22-25, 1-3.
[4] Exhibit 17.
[5] Transcript, Page 78, Lines 9-23.
[6] Transcript, Page 57, Lines 9-21. *See also*, Exhibit 17.
[7] Transcript, Pages 48-49, Lines 17-25, 1-20.
[8] Transcript, Pages 31-32, Lines 25, 1-5.
[9] Transcript, Pages 43-44, Lines 18-25, 1-8.

For a time, it appeared that Jaeger would convey the sewer system to a new limited liability corporation, Blue Lagoon, LLC, owned by Alvin "Bub" Thompson.[10] Blue Lagoon, LLC, and Jaeger actually filed a joint application with the Commission for permission to transfer the sewer system and for a certificate of public convenience and necessity to be issued to Blue Lagoon, LLC.[11] Jaeger has never had such a certificate from this Commission.[12] However, the parties dismissed their application after Jaeger filed for bankruptcy.[13] Ultimately, the circuit court found Jaeger in contempt of court and on April 23, 2008, issued an Order of Commitment directing the Sheriff of Ralls County to place Jaeger into the Ralls County jail until such time as he has purged himself of contempt by making necessary repairs and improvements to the sewer system.

<u>The Appointment of a Receiver</u>

Public Counsel's motion asks the Commission to appoint an interim receiver to take charge of the Blue Lagoon sewer system while Staff seeks the appointment of a permanent receiver in circuit court. Martin Hummel, an engineer employed by the Commission, testified that Staff had not yet found a qualified person willing to serve as a receiver.[14]

<u>CONCLUSIONS OF LAW</u>

The Missouri Public Service Commission has reached the following conclusions of law.

Kenneth Jaeger owns and operates a sewer system for the collection, treatment, and disposal of sewage for gain and therefore is a sewer corporation as that term is defined in Subsections 386.020(48) RSMo (Supp. 2007). As such, Jaeger is a public utility as defined by Section 386.020(42), RSMo (Supp. 2007), and is subject to the Commission's jurisdiction.

Subsection 393.145.1, RSMo (Supp. 2007), provides as follows:

> If, after hearing, the commission determines that any sewer or water corporation that regularly provides service to eight thousand or fewer customer connections is unable or unwilling to provide safe and adequate service, has been actually or effectively abandoned by

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[10] Transcript, Page 30, Lines 14-23. *See also*, Exhibit 13.
[11] Transcript, Page 80, Lines 10-19.
[12] Transcript, Pages 79-80, Lines 24-25, 1-2.
[13] *In the Matter of the Joint Application of Kenneth Jaeger and Blue Lagoon, LLC.,* Case No. SM-2008-0188, Notice of Dismissal, May 6, 2008.
[14] Transcript, Page 62, Lines 19-22.

> its owners, or has defaulted on a bond, note or loan issued or guaranteed by any department, office, commission, board, authority or other unit of state government, the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver. The venue in such cases shall, at the option of the commission, be in the circuit court of Cole County or in the circuit court of the county in which the utility company has its principal place of business.

Furthermore, Subsection 393.145.2, RSMo (Supp. 2007), provides as follows:

> If the Commission orders its general counsel to petition the circuit court for the appointment of a receiver under subsection 1 of this section, it may in the same order appoint an interim receiver for the sewer or water corporation. The interim receiver shall have the authority generally granted to a receiver under subsection 6 of this section, except that the commission cannot authorize the interim receiver to transfer by sale or liquidate the assets of the utility. The interim receiver shall be compensated in an amount to be determined by the commission. The interim receiver shall serve until a judgment on a petition for writ of review of the commission's order, if any, is final and unappealable, and until the circuit court thereafter determines under subsection 5 of this section whether to grant the commission's petition for appointment of receiver.

In addition, Subsection 393.145.3, RSMo (Supp. 2007), provides as follows:

> When the commission files its petition for appointment of receiver in the circuit court, it shall attach to its petition an official copy of its determination under subsection 1 of this section. The commission shall not file such action until its determination under subsection 1 of this section is final and unappealable.

Subsection 393.145.5, RSMo (Supp. 2007), requires that a receiver appointed under that section be "a responsible person, partnership, or corporation knowledgeable in the operation of utilities."

Jaeger has filed for bankruptcy in federal court in the state of Texas. Under the Bankruptcy Code at 11 U.S.C. Section 362(a), the filing of a bankruptcy petition operates as an automatic stay on the commencement or continuation of judicial, administrative or other actions or proceedings against the debtor. However, under 11 U.S.C. Section 362(b)(4), an exception is made for an action or proceeding by a governmental unit to enforce that governmental unit's police and regulatory power. The action Public Counsel asks the Commission to take in this case is aimed at enforcing the Commission's authority to ensure that the customers served by Jaeger's sewer system receive safe and adequate sewer service and thus this action is exempt from application from the automatic stay.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions. The evidence presented by Public Counsel and Staff clearly demonstrates that Jaeger has effectively abandoned the Blue Lagoon sewer system. As a result, raw, untreated sewage is flowing into a stream, creating an obvious danger to nearby residents and the environment of this state. There is a clear and immediate need for the appointment of a receiver to take charge of this company to ensure that its customers are able to receive safe and adequate sewer service.

The Commission would also like to appoint an interim receiver to take immediate control of the operation of this sewer system while this matter is pending in circuit court. However, neither Staff nor Public Counsel has been able to identify a person willing and able to serve in that role. Rather than wait for such a person to be identified, the Commission will direct its Staff to act promptly to file a petition in the Circuit Court of Ralls County seeking the appointment of a receiver.

IT IS ORDERED THAT:

1. The General Counsel of the Commission is directed to petition the Circuit Court of Ralls County for an order attaching the Blue Lagoon sewer system owned and controlled by Kenneth Jaeger and placing that sewer system under the control and responsibility of a receiver.

2. The Commission's Data Center shall mail a copy of this Report and Order to the Trustee in Bankruptcy for Kenneth Jaeger's

bankruptcy case in the United States Bankruptcy Court, Southern District of Texas, Brownsville Division.

3. This report and order shall become effective on July 25, 2008.

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur,
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 15th day of July, 2008.

The Staff of the Missouri Public Service Commission v. Suburban Water and Sewer Company, Inc., and Gordon Burnam

Case No. WC-2008-0030
Decided July 25, 2008

Water §1. The Commission approved a stipulation and agreement requiring compliance with "System Improvement" requirements as a result of a complaint filed by the Staff alleging failure to provide safe and adequate water service to its customers.

ORDER APPROVING STIPULATION AND AGREEMENT, ADOPTING ITS CONDITIONS AND REQUIRING COMPLIANCE THEREWITH, AND DISMISSING GORDON BURNAM

On July 27, 2007, the Staff filed a Complaint against Suburban and Gordon Burnam alleging that Suburban was failing to provide safe and adequate water service to its customers and asking the Commission to order the Respondents to make improvements to the water system. The Staff claimed that Suburban needed: additional water meters, a ten year meter replacement program, flush valves, a certified operator, a pressure reducing valve, a new standpipe, and improvements in order to maintain adequate system pressure.

On September 20, 2007, the Staff filed a report describing significant improvements to the Suburban water system. Suburban hired a certified operator to operate the system, installed many new water meters, provided a plan of the water distribution system, installed flush

valves, and the system appeared to be maintaining adequate water pressure.

On November 13, 2007, the Staff filed a supplemental report describing the status of improvement projects at Suburban. Suburban installed meters on all of its service connections and Staff verified that the flush valves were successfully flushing Suburban's water system. On January 4, 2008, the Staff filed an updated report alleging continued deficiencies with the standpipe and requesting a hearing and disposition of this case.

In anticipation of a July 8, 2008 evidentiary hearing, the Staff listed as remaining issues were replacing the standpipe and maintaining system integrity. On July 3, 2008, the parties present a stipulation and agreement as a resolution of all contested issues in this case.

The Stipulation and Agreement is attached hereto and marked as Attachment "A". It is incorporated as if fully set forth herein. The Commission notes the "System Improvements," which the Commission requires Suburban to undertake and accomplish as follows:

Suburban shall dismantle and remove its current standpipe and replace it with a standpipe of sufficient dimension to provide safe and adequate water service to Suburban's customers. Suburban must acquire the approval of the Department of Natural Resources (DNR) prior to construction of the new standpipe. Suburban will exercise its best efforts, in good faith, to obtain such DNR approval. Suburban agrees to provide the Staff with copies of all information provided to DNR regarding the standpipe project. Suburban agrees to submit its standpipe project application to DNR no later than August 15, 2008. Suburban agrees to comply with DNR plan modification requests that are consistent with DNR regulations. Suburban agrees to inform Staff of such requirements. Suburban agrees to provide the Staff with status reports regarding construction progress every 6 weeks with the first report due 6 weeks after the effective date of an order approving this stipulation and agreement. The standpipe project shall be completed and the standpipe fully operational and used for service no later that March 31, 2009, unless an extension of time is granted by the Public Service Commission. Suburban shall continue to provide monthly reports regarding master meter and customer meter readings in order for the Staff to monitor for any water leakage in the system.

The Stipulation and Agreement contained other provisions pertaining to the settlement of the matter that the Commission approves, but need not reiterate here. On July 7, 2008, the parties jointly filed an

Agreement and Notice of Dismissal in which Mr. Gordon Burnam was dismissed from this matter. The Commission approves the dismissal of Mr. Burnam from this matter.

Having reviewed the Stipulation and Agreement, the Commission finds it reasonable and lawful to approve the Stipulation and Agreement, to require compliance with the "System Improvement" requirements set forth above and to dismiss Mr. Burnam from this matter.

IT IS ORDERED THAT:

1. The unanimous Stipulation and Agreement filed by the Parties is approved. A copy of the Agreement is attached to this order.
2. Suburban shall comply with the "System Improvement" requirements set forth above.
3. Mr. Gordon Burnam is dismissed from this matter.
4. This order shall become effective on August 5, 2008.
5. This case may be closed on August 6, 2008.

Davis, Chm., Murray, Clayton,
Jarrett, and Gunn, CC., concur.

Dale, Chief Regulatory Law Judge

***NOTE:** The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of The Empire District Electric Company's Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*

Case No. ER-2008-0093
Decided July 30, 2008

Electric §1. The Commission authorized Empire to file a tariff sufficient to recover revenues pursuant to a 95 percent pass through fuel adjustment clause. This partial pass through clause will give Empire an incentive not only to avoid blatant wasting of funds, but also to operate more efficiently.

Rates §101. The Commission authorized Empire to file a tariff sufficient to recover revenues pursuant to a 95 percent pass through fuel adjustment clause. This partial pass through clause will give Empire an incentive not only to avoid blatant wasting of funds, but also to operate more efficiently.

REPORT AND ORDER

APPEARANCES

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*This case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 346 S.W. 3d 377 (Mo App. W.D. 2011).

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For the Industrial Intervenors.

DEPUTY CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

Table of Contents

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This order allows Empire to increase the revenue it may collect from its Missouri customers by approximately $22,040,395. As a result, the average residential customer's monthly bill will increase by 6.7%, or approximately $6.13 per month.

Procedural History

On October 1, 2007, The Empire District Electric Company filed tariff sheets designed to implement a general rate increase for electric service in its Missouri service area. The tariff would have increased Empire's annual electric revenues by approximately $34,725,203. The tariff revisions carried an effective date of October 31, 2007.

On October 3, by order, the Commission suspended Empire's tariff until August 28, 2008, the maximum amount of time allowed by the controlling statute.[1] In the same order, the Commission directed that notice of Empire's tariff filing be provided to interested parties and the public. The Commission also established October 23 as the deadline for submission of applications to intervene. Subsequently, the Missouri Department of Natural Resources and the Industrial Intervenors[2] were allowed to intervene.

On November 16, the Commission established the test year for this case as the 12-month period ending June 30, 2007, with an up-date period ending December 31, 2007. Subsequently, the Commission established a further true-up period through February 29, 2008. In its November 16 order, the Commission established a procedural schedule

[1] Section 393.150, RSMo 2000.

[2] Initially, the companies comprising the Industrial Intervenors were Praxair, Inc. and Explorer Pipeline Company. Subsequently, General Mills, Inc., which was originally granted party status on its own, aligned itself with the Industrial Intervenors and ceased to participate as a separate party.

leading to a hearing beginning on May 12, 2008.

The Commission conducted local public hearings in Joplin and Reeds Spring, Missouri, at which the Commission heard comments from Empire's customers and the public regarding Empire's request for a rate increase. The parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing began on May 12, and continued on May 14, 15, 16, and 19. Further true-up direct testimony was prefiled on June 10, with true-up rebuttal following on June 16. A true-up hearing was convened on June 19, but the parties announced that they did not wish to cross-examine any of the witnesses that offered true-up testimony. The true-up hearing was adjourned after the prefiled true-up testimony was admitted into evidence. The parties filed initial post-hearing briefs on June 18, with reply briefs following on July 3.

The Partial Stipulations and Agreements

During the course of the evidentiary hearing, various parties filed three nonunanimous partial stipulations and agreements resolving several issues that would otherwise have been the subject of testimony at the hearing. No party opposed the partial stipulations and agreements. As permitted by its regulations, the Commission treated these unopposed partial stipulations and agreements as unanimous.[3] After considering each of the stipulations and agreements, the Commission approved them as a resolution of the issues addressed in those agreements.[4] The issues that were resolved in those stipulations and agreements will not be further addressed in this report and order.

Overview

Empire is an investor-owned utility providing retail electric service to portions of southwest Missouri, as well as the adjacent corners of Kansas, Oklahoma, and Arkansas. As of June 30, 2007, Empire provided electric service to approximately 166,000 customers, of whom, approximately 147,000 live in Missouri. Empire also provides regulated water service to approximately 4,500 customers in Aurora, Marionville, and Verona, Missouri. Through its wholly owned subsidiary, The Empire District Gas Company, Empire provides natural gas service to approximately 47,000 gas customers in northwest, north central, and west central Missouri.[5] The rates Empire charges for water and natural

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[3] Commission Rule 4 CSR 240-2.115(C).

[4] The Commission issued an *Order Approving Stipulation and Agreement as to Certain Issues* on April 23, 2008, and an *Order Approving Second and Third Stipulation and Agreements as to Certain Issues* on May 20, 2008.

[5] Gipson Direct, Ex. 1, Page 3, Lines 9-17.

gas are not at issue in this case.

Empire began the rate case process when it filed its tariff on October 1, 2007. In doing so, Empire asserted it was entitled to increase its rates enough to increase its Missouri retail rates by $34.7 million per year, an increase of approximately 10.1 percent. Empire set out its rationale for increasing its rates in the direct testimony it filed along with its tariff on October 1. In addition to its filed testimony, Empire provided work papers and other detailed information and records to the Staff of the Commission, Public Counsel, and to the intervening parties. Those parties then had the opportunity to review Empire's testimony and records to determine whether the requested rate increase was justified.

Obviously, there are a multitude of matters about which the parties could disagree. Fortunately, there was no disagreement about many matters and, as a result, those potential issues were never brought before the Commission. Where the parties disagreed, they prefiled written testimony for the purpose of raising those issues to the attention of the Commission. All parties were given an opportunity to prefile three rounds of testimony – direct, rebuttal, and surrebuttal. The process of filing testimony and responding to the testimony filed by other parties revealed areas of agreement that resolved some issues and areas of disagreement that revealed new issues. On May 5, the parties filed a Joint Statement of Issues listing the issues they asked the Commission to resolve.

As previously indicated, a number of the identified issues were resolved by the approved partial stipulations and agreements and will not be further addressed in this report and order. The remaining issues will be addressed in turn.

Conclusions of Law Regarding Jurisdiction

Empire is a public utility, and an electrical corporation, as those terms are defined in Section 386.020(42) and (15), RSMo (Supp. 2007). As such, Empire is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates Empire may charge its customers for electricity. When Empire filed a tariff designed to increase its rates, the Commission exercised its authority under Section 393.150, RSMo 2000, to suspend the effective date of that tariff for 120 days beyond the effective date of the tariff, plus an additional six months.

Conclusions of Law Regarding the Determination of Just and Reasonable Rates

In determining the rates Empire may charge its customers, the Commission is required to determine that the proposed rates are just and reasonable.[6] Empire has the burden of proving its proposed rates are just and reasonable.[7]

In determining whether the rates proposed by Empire are just and reasonable, the Commission must balance the interests of the investor and the consumer.[8] In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.[9]

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and

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[6] Section 393.150.2, RSMo 2000.
[7] *Id.*
[8] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).
[9] *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

> enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.[10]

The Supreme Court has further indicated:

> '[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[11]

In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

> Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.[12]

Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

> [T]he Commission [is] not bound to the use of any single formula or combination of formulae in

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[10] *Id*. at 692-93.
[11] *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944) (citations omitted).
[12] *Federal Power Commission v. Natural Gas Pipeline Co*. 315 U.S. 575, 586 (1942).

> determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' … Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.[13]

The Rate Making Process

The rates Empire will be allowed to charge its customers are based on a determination of the company's revenue requirement. Empire's revenue requirement is calculated by adding the company's operating expenses, its depreciation on plant in rate base, taxes, and its rate of return multiplied by its rate base. The revenue requirement can be expressed as the following formula:

Revenue Requirement = E + D + T + R(V-AD+A)

Where: E = Operating expense requirement
D = Depreciation on plant in rate base
T = Taxes including income tax related to return
R = Return requirement
(V-AD+A) = Rate base

For the rate base calculation:
V = Gross Plant
AD = Accumulated depreciation
A = Other rate base items

All parties accept the basic formula. Disagreements arise over the amounts that should be included in the formula.

The Issues

1. Return on Equity

Discussion:

This issue concerns the rate of return Empire will be authorized to earn on its rate base. Rate base includes things like generating plants, electric meters, wires and poles, and the trucks driven by Empire's repair crews. In order to determine a rate of return, the Commission must determine Empire's cost of obtaining the capital it needs. The relative mixture of sources Empire uses to obtain the capital it needs is its capital structure. Empire's actual capital structure as of February 29, 2008 is:

[13] *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

Common Equity	50.78%
Trust Preferred Stock	4.58%
Long-Term Debt	44.65%[14]

The composition of Empire's capital structure is not an issue in this case.

The cost of long-term debt and preferred stock is determined simply by reviewing the interest rates specified in the debt or stock instruments issued by Empire. Those costs are not challenged by any party and are not an issue. The only issue regarding rate of return that the Commission must decide is Empire's cost of obtaining common equity. To do that the Commission must determine the appropriate rate of return on equity Empire should be allowed to earn.

Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them. In contrast, in determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in Empire rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist. Instead, the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for Empire's ratepayers. In order to obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses.

Three financial analysts offered recommendations regarding an appropriate return on equity in this case. James H. Vander Weide testified on behalf of Empire. Vander Weide is Research Professor of Finance and Economics at Duke University, the Fuqua School of Business. He holds a Ph.D. in Finance from Northwestern University.[15] He recommends the Commission allow Empire a return on equity of 11.6 percent.[16]

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[14] Oligschlaeger True-Up Direct, Ex. 233, Page 3, Lines 5-7.
[15] Vander Weide Direct, Ex. 28, Page 1, Lines 3-10.
[16] Vander Weide Direct, Ex. 28, Page 4, Lines 10-11.

Matthew J. Barnes testified on behalf of Staff. Barnes is employed by the Commission as a Utility Regulatory Auditor III. He has earned a Masters in Business Administration with an emphasis in Accounting from William Woods University.[17] Barnes recommends the Commission allow Empire a return on equity in the range of 9.72 percent to 10.80 percent, with a mid-point of 10.26 percent.[18]

Michael Gorman testified on behalf of the Industrial Intervenors. Gorman is a consultant from St. Louis, Missouri, who holds a Masters in Business Administration with a concentration in Finance from the University of Illinois at Springfield.[19] He recommends the Commission allow Empire a return on equity in the range of 9.5 percent to 10.3 percent, with a recommended return of 10.0 percent.[20]

Findings of Fact:

Cost of Capital can be defined as the return investors expect to receive on alternative investments of comparable risk.[21] Remember that the United States Supreme Court in the *Bluefield* case said a public utility is entitled to rates that will permit it to earn a return equal to the return being earned on investments in businesses with corresponding risks and uncertainties.[22] Therefore, it is appropriate for the Commission to look to the earnings of comparable utilities to determine an appropriate rate of return for Empire.

Financial analysts use three generally accepted methods to estimate a company's fair rate of return on equity. The Discounted Cash Flow (DCF) method assumes the current market price of a firm's stock is equal to the discounted value of all expected future cash flows. The Risk Premium method assumes that all the investor's required return on an equity investment is equal to the interest rate on a long-term bond plus an additional equity risk premium to compensate the investor for the risks of investing in equities compared to bonds. The Capital Asset Pricing Method (CAPM) assumes the investor's required rate of return on equity is equal to a risk-free rate of interest plus the product of a company-specific risk factor, beta, and the expected risk premium on the market

[17] Staff Report - Cost of Service, Ex. 204, Appendix I, Page 1.
[18] Barnes Surrebuttal, Ex. 219, Page 2, Lines 14-18.
[19] Gorman Direct, Ex. 501, Appendix A, Page 1.
[20] Gorman Direct, Ex. 501, Page 2, Lines 12-14.
[21] Vander Weide Direct, Ex. 28, Page 5, Lines 11-12.
[22] *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

portfolio. No one method is any more "correct" than any other method in all circumstances. Analysts balance their use of all three methods to reach a recommended return on equity.

Before discussing the expert opinions offered in this case, the Commission would like to explain what it means by "credibility" in the context of expert opinions regarding an appropriate return on equity. All of the witnesses offered as experts are indeed experts in their field. It is to be expected that experts will reach different conclusions regarding analyses that are based in large measure on professional opinion. When the Commission says in this, or prior decisions, that a particular witness is not credible, it does not mean the Commission believes that witness is untruthful. Conversely, a finding that a return on equity witness in a particular case is credible does not mean the Commission finds him or her to be particularly virtuous. In neither situation should that witness' testimony be given greater or lesser weight in a subsequent case.

Several parties point out in their briefs that in recent rate case decisions for other companies, the Commission has described Mr. Gorman as credible and Dr. Vander Weide as not credible. Those descriptions in other cases have no bearing on the Commission's decision in this case. The Commission will evaluate each witness' testimony on its merits, without regard to any testimony that witness presented to the Commission in other cases.

In evaluating the expert testimony, the Commission is also aware that the witnesses for the company and for the Industrial Intervenors are hired to testify for a reason. Empire, which will benefit from a high return on equity, expects its expert witness to present a relatively high recommendation. Empire's witness, Dr. Vander Weide recommends a return on 11.6 percent. The Industrial Intervenors, who will pay higher electric rates to support a higher return on equity, expect their expert to present a relatively low recommendation. The Industrial Intervors witness, Mr. Gorman, recommends a return of 10.0 percent. It is likely the appropriate return on equity is somewhere between those two extremes.

Dr. Vander Weide, the expert witness offered by Empire, recommends the Commission authorize a return on equity of 11.6 percent. However, Vander Weide's overall recommendation is based on the results of three methods of analysis, one of which yielded a result sharply different from the other two.

Vander Weide's evaluation using a quarterly DCF method resulted in an estimated cost of equity of 11.3 percent.[23] Using an Ex Ante Risk Premium method, Vander Weide reached an estimated cost of equity 10.97 percent[24] and using an Ex Post Risk Premium method he reached an estimated cost of equity ranging between 10.70 percent and 11.35 percent with a midpoint of 11.02 percent.[25] The average result of his two Risk Premium analyses is 11.0 percent.[26] Vander Weide also used two versions of the third method, the CAPM. His Historical CAPM analysis showed an estimated cost of equity of 11.9 percent, while his DCF-Based CAPM applied to the S&P 500 yielded an estimated cost of equity at a whopping 13.0 percent. The average cost of equity from his two CAPM studies was thus 12.5 percent.[27] Vander Weide then averaged the results of his three methods to arrive at his overall recommendation of 11.6 percent.

However, that overall recommendation is simply an average of the results of the three methods and that average is driven up by the CAPM result, especially the DCF-Based CAPM result of 13.0 percent. If the remarkably high CAPM result is thrown out as clearly unreasonable, the average of the other two methods as used by Vander Weide is 11.15 percent.

A return of 11.15 percent is still inflated. For example Vander Weide's DCF estimate of 11.3 percent was based on a market weighted average growth rate.[28] Vander Weide claims to use a market-weight calculation to indicate the relative share of each company in the typical investor's portfolio of companies.[29] That gives inordinately high weight to certain company DCF estimates based on their market value. As Gorman explains, using a simple average DCF return on Vander Weide's proxy group yields a DCF estimate of 10.7 percent.

Similarly, Vander Weide's 11 percent estimate resulting from his risk premium analysis is inflated. As Gorman explains, Vander Weide's calculation uses an average annual DCF return estimate of 11.07 percent for 2006 and 11.06% for 2007. Those returns are higher than the returns on equity authorized by regulatory commissions for integrated

[23] Vander Weide Direct, Ex. 28, Page 26, Lines 1-2.
[24] Vander Weide Direct, Ex. 28, Page 29, Lines 6-9.
[25] Vander Weide Direct, Ex. 28, Page 36, Lines 1-2.
[26] Vander Weide Direct, Ex. 28, Page 36, Lines 3-5.
[27] Vander Weide Direct, Ex. 28, Page 38, Lines 17-24.
[28] Gorman Rebuttal, Ex. 504, Page 5, lines 1-4.
[29] Vander Weide Surrebuttal, Page 15, Lines 16-19.

electric utility companies during those years, which were 10.60 percent and 10.70 percent respectively.[30] Vander Weide's use of those high return estimates results in a very high risk premium estimate of 5 percent for those two years. Using more reasonable DCF return estimates that are in line with those allowed by the various state commissions, Gorman recalculated Vander Weide's ex ante risk premium analysis to yield a return of 10.32 percent.[31]

Commissions have recently allowed average returns on equity to integrated electric utilities, excluding wires-only utilities, at 10.6 to 10.7 percent instead of the 10.32 percent average for all electric utilities.[32] Therefore, an ex ante risk-premium analysis using those higher averages would yield a return .2 to .4 percent higher than the 10.32 percent suggested by Gorman, resulting in a return on equity in the 10.5 to 10.7 range, and the record establishes that Empire is, in fact, a riskier investment than most of its utility peers.

Finally, Dr. Vander Weide employed a third means to calculate an appropriate return on equity for Empire. The capital asset pricing model (CAPM) is used to calculate the expected or required return of a given security by adding the risk-free rate of interest with the company's equity "beta" multiplied by a market risk premium.[33]

In preparing his CAPM analysis, Dr. Vander Weide adopted the July 2007 average yield to maturity on 20-year Treasury bonds of 5.19% as his estimate of a risk-free rate.[34] This approach for estimating the risk-free rate was criticized by both Gorman and Barnes as being too high. The commission agrees with their criticism and notes the yield on 30-year Treasury bonds is the best measure of the risk-free rate for use in CAPM and risk premium analysis because common stock is generally viewed as a long-term investment where the dividends last indefinitely.[35]

The best evidence in the record for establishing a risk-free premium in this case is found in Schedule MPG-10 of Mr. Gorman's direct testimony, where he notes the average 30-year Treasury Bond Yield was 4.91% for all of 2006 and 4.89% for the first six months of 2007.[36] Accordingly, this Commission will adopt the average of those

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[30] Gorman Rebuttal, Ex. 504, Page 9, Lines 1-8.
[31] Gorman Rebuttal, Ex. 504, Page 9, Lines 8-22.
[32] Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 15-22.
[33] Vander Weide Direct, Page36, Lines 8-11.
[34] Vander Weide Direct, Page 36, Lines 22-23.
[35] Roger Morin, New Regulatory Finance, 151 (Public Utility Reports, Inc. 2006).
[36] Gorman Direct, Ex. 501, Schedule MPG-10.

two numbers – 4.90%- as the risk-free premium to be used for our CAPM analysis in this case.

Similarly, Dr. Vander Weide's 0.94 Value Line beta for his proxy group of electric companies[37] seems rather high in comparison to those offered by Gorman and Barnes. Gorman, on the other hand, produced a series of comparable group average Betas for the most recent five-year period. Gorman's comparable group average of .88 for 2007 is one hundredth of a point different from the average of his and Vander Weide's Beta estimates. Accordingly, this number appears most reasonable under the present circumstances.

The final variable necessary in the CAPM analysis is the "market risk premium." Vander Weide's recommended 7.1%. Gorman recommended a range of 6.5% to 7.0%. The evidence in this case indicated Gorman tended to round to the lowest number whenever convenient. In lieu of accepting all of Gorman's adjustments to lower the risk premium in this matter, the Commission will simply pick the midpoint between those two numbers yielding a result of 6.75%. Thus, multiplying the most appropriate Beta in this case (.88) by the average market risk premium of 6.75% produces a number (5.94%) that can be added to the risk-free premium of 4.90% to achieve a CAPM estimate of 10.84%. This number tracks with the high end of Gorman's adjusted CAPM analysis of 10.8% contained in his surrebuttal testimony.[38]

An examination of Gorman's testimony indicates he tends to underestimate an appropriate return on equity for Empire. Gorman utilized a constant growth DCF model that resulted in an estimated return on equity of 11.54 percent.[39] For that model, he used an average of three analyst growth rate projections prepared by Zacks, Reuters, and SNL Financial.[40] The average three to five year growth rate for his analysts is 7.40 percent.[41] Gorman, however, believes his analyst growth rate projections are unreasonable. For that reason, he concludes his constant growth DCF model is unreasonable and does not give it any weight in recommending a return on equity for Empire.[42]

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[37] Vander Weide Direct, Ex. 28, Page 37, Lines 1-2.
[38] Gorman Surrebuttal, Ex. 506, Page 15, Line 22.
[39] Gorman Direct, Ex. 501, Page 18, Lines 21-22.
[40] Gorman Direct, Ex. 501, Page 18, Lines 6-11.
[41] Gorman Direct, Ex. 501, Page 19, Line 3.
[42] Gorman Direct, Ex. 501, Page 32, Line 11

Instead, Gorman relies on a two-stage DCF model that yielded a recommended return on equity of 9.46 percent.[43] That would be lower than the lowest return on equity allowed to an electric utility by any commission in 2007.[44] For purposes of this two-stage DCF model, Gorman assumes that investors believe his proxy companies will grow at the average analyst growth rates for five years, and then beginning in the sixth year grow at the five percent growth rate of the overall national economy forever.[45]

Gorman contends the two-stage DCF model is more reliable because the 7.40 percent analyst growth rate is irrational in that it would project growth to be greater than the growth rate of the overall United States economy. Logically, the growth of a particular company cannot continue to exceed the growth rate of the overall economy forever because eventually the single company would overtake the entire economy.[46] However, that fact does not make Gorman's constant growth DCF model unreliable.

Investors use analysts' growth rates to value stocks in the marketplace and therefore analysts growth rates should be used to estimate the growth component of the DCF model. Companies do not have to grow at the same rate forever for the single-stage DCF model to be reasonable approximation of how prices are determined in capital markets.[47] Furthermore, Gorman's assumption that the companies will grow at the forecasted rate for five years instead of four or six years is essentially arbitrary.[48] As Vander Weide indicates, since investors use analysts' growth forecasts in making decisions to buy and sell stock, the analysts' growth forecasts should be used to estimate the growth component of the DCF model, whether or not Mr. Gorman believes those growth forecast are rational.[49]

Rather than simply being discarded, the results of Gorman's single-stage DCF model can reasonably be averaged against the results of his two-stage DCF model. The average of those two results is 10.5 percent.

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[43] Gorman Direct, Ex. 501, Page 24, Lines 1-3.
[44] Ex. 229.
[45] Gorman Direct, Ex. 501, Page 19, Lines 11-14.
[46] Vander Weide Rebuttal, Ex. 29, Page 28, Lines 22-24.
[47] Vander Weide Rebuttal, Ex. 29, Page 29, Lines 1-7.
[48] Vander Weide Rebuttal, Ex. 29, Page 29, Lines 17-21.
[49] Vander Weide Surrebuttal, Ex. 30, Page 12, Lines 15-19.

Gorman's DCF analyses further understates an appropriate return on equity for Empire because he uses a smaller proxy group of comparable companies for his DCF analysis. As Vander Weide explains:

> It is desirable to choose a relatively large group of comparable risk companies because the estimate of the cost of equity obtained from applying cost of equity methodologies to a single company is uncertain. … However, the uncertainty in estimating the cost of equity by applying cost of equity methodologies to a single company can be significantly reduced by applying cost of equity models to a relatively large group of comparable risk companies.[50]

Both Gorman and Barnes used smaller proxy groups than the group used by Vander Weide. As Vander Weide indicates, the use of the largest possible group of comparable risk companies reduces the risk of selection bias and the risk of a less reliable result.[51] To his credit, Staff's witness Matt Barnes, attempted to create a proxy group that, although small, closely mirrors Empire's business profile[52]

Moreover, the proxy groups used by Vander Weide, Gorman and Barnes are all, on average, less risky than Empire. Each of the proxy groups has an average S&P bond rating of BBB+,[53] whereas Empire's current S&P bond rating is BBB-.[54] For determining an appropriate cost of equity, the difference between a BBB- rating and a BBB+ rating can add between 25 and 50 basis points to a reasonable return on equity.[55]

Furthermore, Vander Weide uses a Quarterly DCF model rather than the Annual DCF model used by both Barnes and Gorman. The Quarterly DCF model is based on the assumption that the comparable proxy companies pay quarterly dividends, while the Annual DCF model is based on the assumption that the comparable proxy companies pay annual dividends. In fact, all the proxy companies in Vander Weide's proxy group pay quarterly dividends,[56] as do those in Barnes' proxy

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[50] Vander Weide Rebuttal, Ex. 29, Pages 3-4, Lines 1-25, 28, 1-3.
[51] Vander Weide Rebuttal, Ex. 29, Page 4, Lines 7-13.
[52] Staff Report – Cost of Service, Ex. 204, Pages 13-14.
[53] Gorman Direct, Ex. 501, Page 15, Line 17; Vander Weide Rebuttal, Ex. 29, Page 7, Lines 1-5.
[54] Transcript, Page 468, Lines 1-3.
[55] Transcript, Page 475, Lines 8-10.
[56] Vander Weide Direct, Ex. 28, Page 18, Lines 22-25.

group.[57] Although both Barnes and Gorman criticize Vander Weide's decision to use the Quarterly DCF model, it is a reasonable decision that enhances the credibility of his result.

The DCF model is a present value measure of investor expectations and, as demonstrated by the proxy groups compiled by all of the analysts, most of those companies pay quarterly dividends. That makes it reasonable to infer that investors expect quarterly payment of dividends. In other words, they expect dividends to be compounded, much the way interest is compounded. Therefore, the quarterly DCF model is the only model that correctly equates the present value of future dividends to the current stock price for companies that pay quarterly dividends.[58]

As a practical matter, the use of the Quarterly DCF model instead of the Annual DCF model has only a small effect. However, the difference between the two models amounts to five basis points with regard to the DCF analysis in Vander Weide's direct testimony.[59]

If the .25 percent adjustment for Empire's lower bond rating and the .05 percent adjustment for use of the Quarterly DCF model are added to the 10.5 percent average of Gorman's two DCF models, the result is a return on equity of 10.8 percent.

That brings the allowed return on equity into the range recommended by Staff's expert, who recommended a return ranging from 9.70 percent to 10.85 percent, with a mid-point of 10.28 percent.[60] Although a return on equity at 10.8 percent would be at the top end of Staff's recommendation, Barnes testified that he would be in agreement with any return on equity within his recommended range.[61]

As a check on the reasonableness of proposed returns on equity, the Commission reviews regulatory decisions from around the country, as reported from surveys collected by Regulatory Research Associates. That report reveals the average allowed return on equity for electric utilities for 2007 was 10.36 percent, with a median return of 10.24 percent.[62]

The Regulatory Research Associates report also indicates the average return on equity allowed in 2007 to integrated electric utilities,

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[57] Vander Weide Rebuttal, Ex. 29, Page 8, Lines 16-19.
[58] Vander Weide Surrebuttal, Ex. 30, Page 16, Lines 9-13.
[59] Vander Weide Surrebuttal, Ex. 30, Page 16, Lines 19-20.
[60] Barnes Rebuttal, Ex. 218, Page 2, Lines 10-11.
[61] Transcript, Page 514, Lines 6-11.
[62] Ex. 230.

excluding wires-only electric utilities, is 10.51 percent.[63] For the one-year period from April 2007 though March 2008, the average authorized return for integrated electric utilities is 10.6 percent.[64] For the six-month period from October 2007 through March 2008, the average authorized return for integrated electric utilities rose to 10.7 percent .[65]

As argued by Vander Weide, it is more appropriate to compare the return allowed to Empire to the 10.51 percent return on equity allowed in 2007 to integrated electric utilities, excluding wires-only electric utilities. Integrated electric utilities are generally more risky than wires-only electric utilities because integrated utilities are currently making large investments in electric generation plant, while wires-only utilities do not need to make such investments.[66] In addition, integrated electric utilities are responsible for operating generating plants and buying fuel to run those plants, which also increases the risk they face. In general, increased risk translates to an increased allowed return on equity, and regulatory agencies around the country have recognized that increased risk by allowing integrated electric utilities higher returns on equity.

Gorman criticized the proposed distinction between integrated and wires-only electric utilities, pointing out that it is possible for an integrated electric company to have a lower risk than a wires-only company. As an example, he pointed to wires-only electric utilities in Illinois that have a much higher level of risk than the integrated electric utilities in Missouri.[67] Certainly, individual wires-only electric utilities can have a high level of risk, as illustrated by the Illinois situation. However, the high level of risk in Illinois is attributable to political circumstances unique to that state. That does not change the fact that integrated electric companies are generally more risky than wires-only utilities.

Since Empire is an integrated electric utility, the best comparison is to the return on equity allowed to other integrated utilities. However, whether measured against the return on equity allowed to all electric utilities or just intergrated electric utilities, a return on equity of 10.8 percent is the one number most supported by the evidence in this case and well within either "zone of reasonableness."

Proposed Reduction for Fuel Adjustment Clause

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[63] Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 3-11.
[64] Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 20-22.
[65] Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 15-16.
[66] Vander Weide Surrebuttal, Ex .30, Page 10, Lines 5-7.
[67] Transcript, Pages 799-800, Lines 23-25, 1-17.

In this Report and Order, the Commission is authorizing Empire to implement a fuel adjustment clause for the first time. Public Counsel and the Industrial Intervenors contend the allowed return on equity should be adjusted downward to recognize the decreased risk Empire will face because it now has a fuel adjustment clause.

There really is no dispute that the implementation of a fuel adjustment clause will reduce the level of operating risk that Empire faces. Empire's President and CEO, William Gipson, testified that he agreed with that point.[68] The question is whether the analysts' recommendations already take that decreased risk into account.

Fuel adjustment clauses are commonly used around the country, so most of the comparable companies included in the proxy groups used by the various return on equity analysts already have fuel adjustment clauses in place. For the proxy group used by Barnes on behalf of Staff, fifteen out of seventeen companies have a fuel adjustment clause,[69] twelve of the fifteen companies in Gorman's proxy group have fuel adjustment clauses,[70] and virtually all of the proxy group used by Vander Weide for Empire have fuel adjustment clauses.[71] Moreover, the overwhelming majority of the jurisdictions where traditional vertically-integrated utilities like Empire operate allow for the 100 percent pass-through of fuel and purchased power costs, which are the most significant costs Empire faces. This Report and Order will not allow Empire to pass-through 100 percent of those costs, meaning Empire will retain more risk than most comparable companies.

As indicated, most of the companies included in the proxy groups used by the analysts to estimate an appropriate return on equity for Empire already operate under a fuel adjustment clause. On that basis, Vander Weide for Empire, and Barnes for Staff,[72] agree no adjustments to their recommendations are necessary to recognize the implementation of a fuel adjustment charge.

Furthermore, the proxy groups used by all of the analysts are already less risky than Empire. Empire has a BBB minus bond rating from S&P, while the proxy companies have a BBB plus bond rating.[73] That means a fuel adjustment clause could make Empire less risky,

[68] Transcript, Page 230, Lines 22-25.
[69] Transcript, Page 515, Lines 9-16.
[70] Overcast Rebuttal, Ex. 10, Page 13, Lines 17-20.
[71] Transcript, Page 495, Lines 7-10.
[72] Transcript, Page 527, Lines 15-25.
[73] Transcript, Page 466, Lines 3-7.

while still not making it less risky than the proxy group of comparable companies. Hence, there is no reason to reduce the cost of equity indicated by an analysis of the proxy group.[74]

Conclusions of Law:

In assessing the Commission's ability to use different methodologies to determine just and reasonable rates, the Missouri Court of Appeals has said:

> Because ratemaking is not an exact science, the utilization of different formulas is sometimes necessary. … The Supreme Court of Arkansas, in dealing with this issue, stated that there is no 'judicial mandate requiring the Commission to take the same approach to every rate application or even to consecutive applications by the same utility, when the commission in its expertise, determines that its previous methods are unsound or inappropriate to the particular application' (quoting *Southwestern Bell Telephone Company v. Arkansas Public Service Commission,* 593 S.W. 2d 434 (Ark 1980).[75]

Furthermore,

> Not only can the Commission select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances, but it also may adopt or reject any or all of any witnesses' testimony.[76]

In another case, the Court of Appeals recognized that the establishment of an appropriate rate of return is not a "precise science":

> While rate of return is the result of a straight forward mathematic calculation, the inputs, particularly regarding the cost of common equity, are not a matter of 'precise science,' because inferences must be made about the cost of equity, which involves an estimation of investor expectations. In other words, some amount of speculation is inherent in any ratemaking decision to the

[74] Transcript, Page 466, Lines 17-25.
[75] *State ex rel. Assoc. Natural Gas Co. v. Public Service Commission,* 706 S.W. 2d 870, 880 (Mo. App. W.D. 1985).
[76] *Id.*

> extent that it is based on capital structure, because such decisions are forward-looking and rely, in part, on the accuracy of financial and market forecasts.[77]

Section 386.266, RSMo (Supp. 2007), the statute that allows the Commission to order Empire to implement a fuel adjustment clause, specifically allows the Commission to modify a company's allowed return on equity to reflect the implementation of a fuel adjustment clause. Specifically, subsection 7 of that statute provides that the Commission may:

> take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

Decision:

As fully explained in its findings of fact, the Commission finds that the return on equity recommendation offered by Empire's witness, James Vander Weide, overstates the appropriate return on equity for Empire. Conversely, the return on equity recommendation offered by the Industrial Intervenors' witness, Michael Gorman, would deny the company an appropriate return. The appropriate return on equity is to be found between those extremes, within the recommended range offered by Staff's witness, Matthew Barnes.

Based on the evidence in the record, on its analysis of the expert testimony offered by the parties, and on its balancing of the interest of the company's ratepayers and shareholders, the Commission finds that 10.8 percent is a fair and reasonable return on equity for Empire that will allow it to compete in the capital market for the funds needed to maintain its financial health.

2. The Proposed Fuel Adjustment Clause

Empire's Ability to Request a Fuel Adjustment Clause and the Motion to Reject Specified Tariff Sheets and Strike Testimony:

Before addressing whether a fuel adjustment clause is

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[77] *State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376, 383 (Mo App. W.D. 2005).

appropriate for Empire, the Commission must address a motion filed by the Industrial Intervenors on April 11, 2008, asking the Commission to reject those portions of Empire's tariff and testimony requesting implementation of a fuel adjustment clause. On May 1, the Commission indicated it would take up the issues raised in the Industrial Intervenors' motion as part of the case. While only the Industrial Intervenors filed a motion to strike, Public Counsel asserted the same arguments against implementation of a fuel adjustment clause.

The Industrial Intervenors and Public Counsel argue Empire is precluded from asking the Commission to implement a fuel adjustment clause because of a stipulation and agreement to which Empire was a party in Empire's 2004 rate case, ER-2004-0570. The Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense was filed on February 22, 2005, and was signed by three parties: Empire, Public Counsel, and Praxair and Explorer Pipeline Company - two of the three Industrial Intervenors in this case. No other party signed the stipulation and agreement, but no one objected to it. The Commission deemed it to be unanimous, as permitted by the Commission's rules,[78] and approved it as part of the Report and Order that resolved Empire's rate case.[79]

The signatory parties agreed Empire should be able to collect an additional amount for changes in its fuel and purchased power costs through an Interim Energy Charge, subject to true-up and refund. The Interim Energy Charge was to remain in effect for a period of three years measured from the effective date of Empire's tariff implementing the Commission's decision in the rate case. That tariff went into effect on March 27, 2005,[80] so the Interim Energy Charge Period, by the terms of the stipulation and agreement, ended on March 27, 2008.

Paragraph 4 of the stipulation and agreement is the provision that Public Counsel and the Industrial Intervenors have cited in support of their position. That paragraph states:

> In consideration of the implementation of the IEC in this case and the agreement of the Parties to waive their respective rights to judicial review or otherwise challenge

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[78] Commission Rule 4 CSR 240-2.115(2)(C).

[79] *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase,* Report and Order, 13 Mo P.S.C. 3d 350, 382 (March 10, 2005)

[80] *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase,* Order Approving Tariff in Compliance with Commission Order, Case No. ER-2004-0570 (March 21, 2005).

> a Commission order in this case authorizing and approving the subject IEC, for the duration of the IEC approved in this case Empire agrees to forego any right it may have to request the use of, or to use, any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of a fuel adjustment clause, a natural gas cost recovery mechanism, or other energy related adjustment mechanism to which the Company would otherwise be entitled. Empire also agrees not to request an Accounting Authority Order or other regulatory mechanism to accumulate and or recover any amount of variable fuel and purchased power cost that exceeds the IEC ceiling.

Empire filed its tariff in this case, including its request for implementation of a fuel adjustment clause, on October 1, 2007, which is within the Interim Energy Charge Period established in the stipulation and agreement. On that basis, Public Counsel and the Industrial Intervenors argue Empire is precluded from requesting a fuel adjustment clause in this case.

That is not, however, the end of the matter. Paragraph 1c of the stipulation and agreement establishes the duration of the Interim Energy Charge Period as ending three years after the effective date of Empire's implementing tariff, "unless earlier terminated by order of the Commission." In Empire's next rate case, ER-2006-0315, Empire asked the Commission to terminate the Interim Energy Charge because under the Interim Energy Charge it was under-recovering its fuel cost by $26.8 million per year.[81] In deciding to allow Empire to recover its fuel-costs in base rates, without application of the Interim Energy Charge, the Commission stated:

> The Commission concludes that it must determine just and reasonable rates based on what it deems to be Empire's prudently incurred costs. To the extent that the 2005 Stipulation limits recovery of Empire's prudently incurred fuel and purchased power expenses, then it attempts to limit one of the "factors which determine

[81] Empire also asked the Commission to implement a fuel adjustment clause as part of that rate case, but the Commission refused to consider that request because of the previously described provision in the 2005 stipulation and agreement.

> rates" and is overcome by the Commission's exercise of the police power granted to it. Moreover, the Commission concludes that its prior approval of the 2005 Stipulation in no way *estops* or hampers it in its determination of just and reasonable rates. The Commission concludes that Empire may recover the prudently incurred fuel and purchased power costs at the level determined above in base rates.[82]

That Report and Order took effect on December 31, 2006.[83]

The Commission's Report and Order rejected the tariff Empire had previously filed, so on December 27, 2006, Empire filed a new tariff in place of the tariff the Commission had rejected. The new tariff carried an effective date of January 27, 2007, but along with its revised tariff, Empire filed a motion asking the Commission to expedite its approval of the revised tariff so it could go into effect on January 1, 2007.[84] Despite the objections of some parties, the Commission issued an order on Friday afternoon, December 29, granting the expedited treatment and approving the tariff to be effective on Monday, January 1.[85]

On January 4, 2007, Public Counsel filed a petition for writ of mandamus with the Missouri Court of Appeals, which that court denied. Public Counsel then proceeded to the Missouri Supreme Court, which issued a preliminary writ on May 1, 2007. The Supreme Court made that writ permanent in an opinion issued on October 30, 2007.[86] In that

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[82] *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase,* Report and Order, Case No. ER-2006-0315 (December 21, 2006), page 44.

[83] The Commission issued a Report and Order Upon Reconsideration in Case No. ER-2006-0315 on March 26, 2008. The quoted language was unchanged in the revised Report and Order and is found on page 51. Requests for Rehearing have been filed regarding that Report and Order Upon Reconsideration, but the Commission is commanded to take no further action in that cause by a Writ of Mandamus issued by the Missouri Supreme Court on April 4, 2008, in Supreme Court Case No. SC89176. **The December 21, 2006, Report and Order has not been directly challenged at the Supreme Court.**

[84] *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase,* Motion for Expedited Consideration and Approval of Tariff Sheets Filed in Compliance with Commission Order on Less than Thirty Days' Notice, Case No. ER-2006-0315 (December 27, 2006).

[85] *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase,* Order Granting Expedited Treatment and Approving Tariffs, Case No. ER-2006-0315 (December 29, 2006).

[86] *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632 (Mo 2007).

opinion, the Supreme Court ordered the Commission to "vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006 and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs."[87] Despite the Supreme Court's order, this dispute is still not resolved and the matter is once again before the Supreme Court on another Writ of Mandamus.[88]

The confusion in Empire's previous rate case is relevant because there is a disagreement about whether Empire's tariff purporting to implement the Report and Order in ER-2006-0315 and its early termination of the Interim Energy Charge ever became effective. Public Counsel and the Industrial Intervenors contend that if the Commission's December 29, 2006 order approving that tariff is vacated, the tariff never went into effect and the earlier tariff that includes the Interim Energy Charge must remain in effect. Empire contends that if the Commission's order approving its tariff is vacated, then the tariff went into effect by operation of law on its original effective date, January 27, 2007. As previously indicated, that dispute is currently before the Missouri Supreme Court and the Commission will not attempt to resolve that question in this case.

The Commission's decision to terminate the Interim Energy Charge in Case No. ER-2006-0315 still stands, so on that basis alone the Industrial Intervenors' motion is denied. Even if the Commission's previous decision to terminate the Interim Energy Charge is found not to be effective, the Commission still concludes that the possible continued existence of the 2005 Interim Energy Charge does not preclude the Commission from ordering Empire to implement a fuel adjustment clause in this case. As the Commission found in the previous rate case, the 2005 stipulation and agreement specifically provides that the Commission can order the Interim Energy Charge to be terminated early. Empire's severe under-earning due to rising fuel and purchased power cost, which was the basis for the Commission's decision to terminate the Interim Energy Charge in the last rate case, has continued. The evidence presented in this case demonstrated that between 2002 and 2006, Empire's shareholders absorbed $85.5 million in fuel and purchased power costs that the company was unable to collect in rates.[89] Under these circumstances, as the Commission concludes elsewhere in this order, the Commission must implement a fuel adjustment clause in

[87] Id. at 637.
[88] Missouri Supreme Court Case No. SC89176.
[89] Staff Report - Cost of Service, Ex. 204, Page 61.

order to set just and reasonable rates that allow Empire the opportunity to earn its allowed return on equity as required by Section 393.150.2 RSMo 2000.

The language of the stipulation and agreement in ER-2004-0570 provides that Empire agreed to forego, for the duration of the Interim Energy Charge, any right it may have to request the use of a fuel adjustment clause. In its Report and Order in Empire's last rate, ER-2006-0315, the Commission accepted that the stipulation and agreement precluded Empire from requesting a fuel adjustment clause at that time. However, the situation at that time can be distinguished from the situation currently facing the Commission in that the Interim Energy Charge was still in effect at the time the Commission issued its Report and Order in ER-2006-0315. By any interpretation, the Interim Energy Charge Period expired on March 27, 2008, approximately five months before the rates that will result from the current rate case will go into effect.

If Public Counsel and the Industrial Intervenors' interpretation of the stipulation and agreement is to be accepted, it would mean that Empire was gagged from even broaching the subject of a fuel adjustment clause until after the Interim Energy Charge Period had expired, precluding it from having any sort of recovery mechanism in place for at least the eleven months it would take to complete a rate case filed the day after the Interim Energy Charge Period expired. Thus, in effect, the three-year Interim Energy Charge Period described in the stipulation and agreement would become a three-year-and-eleven-month period with no Interim Energy Charge or any other fuel adjustment clause allowed in the last eleven months. Regardless of what the parties may have intended when they signed the stipulation and agreement, a result that forbade Empire to have either an interim energy charge or a fuel adjustment clause for an additional eleven months would be contrary to the public interest in ensuring that Empire is allowed to charge just and reasonable rates.

For the foregoing reasons, the Commission concludes Empire is not precluded from requesting a fuel adjustment clause and therefore will deny the Motion to Reject Specified Tariff Sheets and Strike Testimony.

General Findings of Fact Regarding Fuel Adjustment Clauses:

The rates Empire will be allowed to charge its customers are based on a determination of the company's revenue requirement. A revenue requirement is based on the costs and income the company experienced during a historical test year. For this case, the test year was

established as the 12-month period ending on June 30, 2007, updated through December 31, 2007, with an additional true-up period through February 29, 2008. That means the Commission will use the expenses and revenues measured during the test year to predict the expenses the company will be allowed to recover in future rates. Expenses possibly incurred in the future generally are not included in the rate calculations.

Under traditional ratemaking procedures, at the end of the rate case the Commission establishes the rates an electric utility can charge. Once rates are established, the utility cannot change those rates without filing a new rate case and restarting the review process. However, in 2005, the Missouri legislature passed a law allowing the Commission to establish a mechanism to allow an electric utility to make periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs.[90] The sort of mechanism envisioned by the statute is generally known as a fuel adjustment clause. Empire has requested a fuel adjustment clause in this case.

Requests from Missouri electric utilities for implementation of a fuel adjustment clause are a relatively recent development because of the recent statutory change. However, fuel adjustment clauses are frequently allowed by utility commissions in other states.[91] Even the Industrial Intervenors' witness, Michael Gorman quoted a Standard & Poors report that stated: "of comparable significance to supporting credit quality is regulatory approval for timely recovery of fuel costs, especially in an environment of elevated commodity prices."[92] Indeed, this statute and the accompanying rules have merely transported Missouri back into the mainstream of utility regulation. That mainstream of regulation recognizes that it is impossible for a utility to earn its allowed return on equity in a rising cost environment without a fuel adjustment clause.

While the new statute, Section 386.266, allows the Commission to approve a fuel adjustment clause, in effect, overturning a 1979 Missouri Supreme Court decision finding fuel adjustment clauses to be contrary to Missouri law for residential customers,[93] the statute does not require the Commission to approve a fuel adjustment clause. Instead, it

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[90] Section 386.266, RSMo (Supp. 2007).

[91] Overcast Direct, Ex. 8, Pages 22-23, Lines 21-23, 1-10. *See also*, Overcast Rebuttal, Ex. 10, Schedule HEO-1.

[92] Gorman Direct, Ex. 501, Page 7, Lines 34-37.

[93] *State ex rel. Utility Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41 (Mo. banc 1979).

specifically gives the Commission authority to reject a proposed fuel adjustment clause after giving an opportunity for a full hearing in a general rate case.[94] The statute, while not providing specific guidance on when a fuel adjustment clause should be approved, does provide some guidance on when such a clause is appropriate. Specifically, it indicates any such fuel adjustment clause must be reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity.[95]

There are circumstances when the use of a fuel adjustment clause may be appropriate to preserve the financial health of the utility, and no one, including ratepayers, benefits when a utility becomes financially unhealthy. In an era where fuel costs are highly volatile, a fuel adjustment clause may be appropriate if the company is to earn its authorized rate of return. The problem then is how to determine when a fuel adjustment clause is appropriate.

General Conclusions of Law Regarding Fuel Adjustment Clauses:

Section 386.266.1, RSMo (Supp. 2007), the statute that allows the Commission to establish a fuel adjustment clause provides as follows:

> Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation. The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.

Subsection 4 of that statute sets out some of the provisions that must be included in a fuel adjustment clause as follows:

> The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only

[94] Section 386.266.4, RSMo (Supp. 2007).
[95] Section 386.266.4(1), RSMo (Supp. 2007)

> after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. The commission may approve such rate schedule after considering all relevant factors which may affect the cost or overall rates and charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:
>
> *(1) Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity;*
>
> (2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds;
>
> (3) In the case of an adjustment mechanism submitted under subsections 1 and 2 of this section, includes provisions requiring that the utility file a general rate case with the effective date of new rates to be no later than four years after the effective date of the commission order implementing the adjustment mechanism. …
>
> (4) In the case of an adjustment mechanism submitted under subsections 1 or 2 of this section, includes provisions for prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen-month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rate. (emphasis added)

Subsection 4(1) is emphasized because that is the key requirement of the statute. Any fuel adjustment clause the Commission allows Empire to implement, must be reasonably designed to allow the company a sufficient opportunity to earn a fair return on equity;

Subsection 7 of the fuel adjustment clause statute provides the Commission with further guidance, stating the Commission may:

> take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's

> allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

Finally, subsection 9 of that statute requires the Commission to promulgate rules to "govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments." In compliance with the requirements of the statute, the Commission promulgated Commission Rule 4 CSR 240-3.161, which establishes in detail the procedures for submission, approval, and implementation of a fuel adjustment clause.

Is a Fuel Adjustment Clause Appropriate?

Findings of Fact:

The Commission addressed the question of when a fuel adjustment clause is appropriate in recent rate cases for two other Missouri electric utilities. In both cases, the Commission accepted three criteria for determining whether an electric utility should be allowed to implement a fuel adjustment clause. The Commission concluded that a cost or revenue change should be tracked and recovered through a fuel adjustment clause only if that cost or revenue change is:

1. Substantial enough to have a material impact upon revenue requirements and the financial performance of the business between rate cases;
2. beyond the control of management, where utility management has little influence over experienced revenue or cost levels; and
3. volatile in amount, causing significant swings in income and cash flows if not tracked.[96]

After applying those criteria, the Commission found that fuel costs for AmerenUE, which derived most of its power through its own coal or nuclear-fired generating plants, were not sufficiently volatile to justify the use of a fuel adjustment clause.[97] Aquila, in contrast to AmerenUE, derived much of its power through natural gas-fired

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[96] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Pages 20-21.

[97] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service*, Report and Order, Case No. ER-2007-0002, May 22, 2007, Page 26.

generating plants and purchased power. In those circumstances, the Commission concluded that Aquila would be allowed to implement a fuel adjustment clause.[98]

Applying that three-part test to Empire, it is clear that Empire's fuel and purchased power cost is substantial. For Empire's proposed test year revenue requirement calculation, the cost of fuel and purchased power equals 37.63 percent of the company's revenue requirement.[99] Over the past 5 years, Empire's fuel costs have increased by seventy percent.[100] Staff estimated that between 2002 and 2006, Empire's shareholders had to absorb approximately $85.5 million of fuel and purchased power costs between rate cases.[101] Because of rising fuel costs, Empire's actual earned return on equity in 2006 was about nine percent. In 2007 that dropped to only about seven percent.[102]

A very high percentage of Empire's need for electricity is met through gas-fired generation and spot purchased power. Those percentages are significantly higher for Empire than they were for Aquila, which the Commission allowed to implement a fuel adjustment clause in its recent rate case.[103] Natural gas and spot purchased power are traded in competitive markets. As a result, Empire has little control over the market price it pays for those commodities.[104]

Fuel and purchased power costs have certainly been volatile in recent years. Between 2005 and 2006, Empire's fuel costs increased from $128 million to $171 million. Of course, such costs can also decline, as they did in 2002 and 2003.[105] The level of volatility is particularly high for natural gas, the purchase of which consumes 38 percent of the dollars Empire spends on the purchase of fuel and purchased power.[106]

Public Counsel suggests Empire should not be allowed to implement a fuel adjustment clause in this case because: 1) rates set in this case are likely to remain in effect only for 21 months; (2) Empire's

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[98] *In the Matter of the Tariffs of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P Increasing Electric Rates,* Report and Order, Case No. ER-2007-0004, (May 17, 2007), Page 37.
[99] Overcast Direct, Ex. 8, Page 5, Lines 21-22.
[100] Transcript, Page 236, Lines 12-16.
[101] Staff Report – Cost of Service, Ex. 204, Page 61.
[102] Transcript, Page 240, Lines 16-25.
[103] Staff Report – Cost of Service, Ex. 204, Page 61.
[104] Overcast Direct, Ex. 8, Page 12, Lines 18-20.
[105] Overcast Direct, Ex. 8, Page 8, Table 1.
[106] Staff Report – Cost of Service, Ex. 204, Page 61.

base level of fuel costs is derived from models of likely fuel costs for all of 2008, so the first four months of the 21 months are based on current fuel costs; 3) Empire is protected against extreme fuel price volatility by long-term contracts and hedging arrangements; and 4) starting in January 2009, Empire will begin receiving wind energy under a new purchased power agreement.[107]

Public Counsel's arguments are flawed and unpersuasive. First, even though the rates are likely to remain in effect for only 21 months, Empire's past experience has shown that fuel and purchased power costs can swing a great deal in 21 months. Second, if the first four months are based on estimated fuel costs for 2008, the remaining 17 months are subject to volatile fuel prices. Third, Empire's long-term contracts and hedging arrangements do not provide complete protection against fuel cost volatility. Empire's variable fuel and purchased power costs for the trued-up test year amounted to over $151 million,[108] and large portions of those costs remain unhedged.[109] Fourth and finally, the wind energy Empire will obtain from the Meridian Way wind farm will provide more stability in Empire's energy supply but will meet only a small portion of the company's energy needs, covering only about three percent of Empire's energy needs after accounting for predicted growth.[110]

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

The evidence demonstrates that Empire's situation meets the Commission's three-prong test for determining whether a fuel adjustment clause is appropriate Empire's fuel and purchased-power costs are a substantial portion of the company's costs and variations in those costs can rapidly eat up the returns the company could otherwise earn. A large portion of Empire's fuel costs are used to purchase natural gas, a product that is traded in a competitive marketplace over which Empire can exercise little control. Finally, the price of the natural gas Empire needs to generate much of its electricity is volatile. Given current market conditions observed by the Commission in this case, it would be impossible for Empire to earn its Commission allowed return on equity without a fuel adjustment clause. Under the circumstances, a fuel

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[107] Kind Rebuttal, Ex. 303, Pages 6-7, Lines 12-22, 1-15.
[108] Oligschlaeger True-Up Direct, Ex. 233, Page 4, Lines 9-12.
[109] Overcast Surrebuttal, Ex. 11, Page 8, Lines 7-17.
[110] Overcast Surrebuttal, Ex. 11, Page 9, Lines 9-23.

adjustment clause is appropriate to give Empire an opportunity to earn a reasonable return on its investment.

Appropriate Incentive Mechanism

Findings of Fact:

The statute that authorizes the Commission to establish a fuel adjustment clause for Empire already includes features designed to give the company an incentive to maximize its income and minimize its costs. Specifically, the statute requires a utility operating under a fuel adjustment clause to file a new rate case every four years, and requires the Commission to review the prudence of the company's purchasing decisions every 18 months. But regulatory reviews are only a partial substitute for the direct incentives that can result from a utility's quest for profit. Therefore, the statute allows the Commission to include features "designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities."[111]

Approximately seventeen states do not have fuel adjustment mechanisms because they have passed some form of deregulation allowing wholesale electric generators to recover those costs. Of the states that allow fuel adjustment clauses, the vast majority of those states allow 100 percent pass-through of fuel costs.[112] In fact, Maurice Brubaker, witness for the Industrial Intervenors, could only identify four other states besides Missouri that had ever allowed less than a 100 percent pass through of fuel and purchased power costs as an incentive mechanism.[113] Brubaker also explained that when less than 100 percent pass-through of costs is allowed, the fuel adjustment clauses used in other states usually allow a fairly high rate of pass-through so the utility can recover a substantial portion of its rising fuel costs. He testified that the allowed pass-through rate is in the "80 to 90, 95 percent range".[114]

Empire proposed the Commission use the same incentive mechanism it used when it established a fuel adjustment clause for Aquila in that company's recent rate case.[115] The Aquila fuel adjustment

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[111] Section 386.266.1, RSMo (Supp. 2007).

[112] Overcast Rebuttal, Ex. 10, Schedule HEO-1. For example, Oklahoma's statute that authorizes the use of a fuel adjustment clause does not authorize the use of incentive mechanisms and presumes the actual cost of fuel will be passed to consumers. 17 Okl. St. Ann. Section 251.

[113] *See generally*, Ex. 32.

[114] Transcript, Page 778, Lines 8-15.

[115] Transcript, Page 637, Lines 4-7.

clause included a 95 percent pass-through provision.[116] That means only 95 percent of any over or under recovery balance, measured against a base level, would be passed to customers under the fuel adjustment clause.[117] The other 5 percent would be absorbed by Empire's shareholders.

All parties agree the appropriate base level is the normalized fuel and purchased power costs estimated for this case.[118] That amount was approximately $174.3 million,[119] and represents a forecast of fuel costs for calendar year 2008.[120]

Empire's fuel and purchased power costs have increased by substantial amounts in recent years. In 2001, those costs increased by over $28 million and in 2006, they increased by over $44 million.[121] Assuming costs could increase another $20 million, a five percent pass-through would cost Empire $1 million, an amount equal to almost three percent of Empire's net earnings and 17 basis points of its allowed return on equity.[122]

The other parties proposed similar incentive mechanisms at different levels. Staff calculated that over the four years between 2002 and 2006, Empire's shareholders actually absorbed approximately 60 percent of increased fuel and purchased power costs, with the other 40 percent flowing through to customers. Thus, any pass through of costs under a fuel adjustment clause greater than 40 percent would shift the risk of rising fuel prices from the company to its customers. Recognizing that the purpose of a fuel adjustment clause is to shift some risk to customers, Staff proposed to allow Empire to pass through between 60 and 80 percent of costs, with 70 percent as a recommended mid-point.[123]

Public Counsel contends Empire does not need to have a fuel adjustment clause at this time. But if a fuel adjustment clause were ordered, Public Counsel would limit the pass-through to the low end of Staff's range, 60 percent.[124]

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[116] *In the Matter of the Tariffs of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P Increasing Electric Rates,* Report and Order, Case No. ER-2007-0004, (May 17, 2007), Page 54.
[117] Keith Direct, Ex. 2, Page 26, Lines 16-17.
[118] Transcript, Page 669, Lines 1-4.
[119] Transcript, Page 738, Lines 10-13.
[120] Overcast Rebuttal, Ex. 10, Page 8, Line 13.
[121] Overcast Direct, Ex. 9, Page 8, Table 1.
[122] Brubaker Surrebuttal, Ex. 505, MEB Schedule 1.
[123] Staff Report – Cost of Service, Ex. 204, Pages 62-63.
[124] Kind Rebuttal, Ex. 303, Page 11, Lines 7-16.

The Industrial Intervenors' witness, Maurice Brubaker, proposed a more complicated plan that incorporated a limited pass-through of costs. Initially, in his direct testimony, Brubaker proposed a fuel adjustment clause using a base level surrounded by a $1.2 million symmetrical dead band, followed on each side by two symmetrical sharing bands. For the first $6.0 million, 90 percent of costs or savings would be passed to customers. For the next $6.0 million, 80 percent of costs would be passed to customers. For variations beyond the sharing bands, pass-through would be 100 percent. The maximum impact on Empire's shareholders would be limited to $3 million.[125]

In his surrebuttal testimony, Brubaker proposed an alternative incentive plan that eliminates the $1.2 million dead band and replaces it with two sharing bands. For the first $20 million deviation from base, 95 percent of the deviation is passed to customers. For the next $20 million, the sharing is 90 percent to customers and 10 percent to shareholders. For deviations greater than approximately $40 million (31 percent from base), the pass-through is 100 percent. This plan still caps the maximum impact on Empire's shareholders at $3 million.

The goal of all these pass-through plans is to ensure that Empire retains sufficient financial incentive to make a strong effort to reduce its fuel and purchased power costs. If all such costs can be passed 100 percent to customers, Empire's incentive to control those costs is reduced.

The statute that allows the Commission to approve a fuel adjustment clause contains some protections to ensure the electric utility acts prudently to control its costs. Notably, it requires the Commission to undertake periodic prudence reviews of the company's incurred costs.[126] Empire suggests a prudence review is the only incentive it needs to control its fuel costs and that therefore a 100 percent pass-through plan would be appropriate.[127] However, an after-the-fact prudence review is not a substitute for an appropriate financial incentive, nor is an incentive provision intended to be a penalty against the company. Rather, a financial incentive recognizes that fuel and purchased power activities are very complex and there are actions that Empire can take that will affect the cost-effectiveness of those activities.

A prudence review is necessarily limited by the availability of trained people with the time available to devote to a detailed examination

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[125] Brubaker Rebuttal, Ex. 502, Page 8, Lines 4-24.
[126] Section 386.266.4(4), RSMo (Supp. 2007).
[127] Overcast Direct, Ex. 8, Page 26, Lines 17-23.

of the company's actions. The Commission does not doubt that its Staff will do a good job of conducting a prudence review, but there are limits on the ability of Staff to uncover exactly all the records and data needed to establish whether a given decision is prudent.[128] A prudence review can be expected to evaluate the major decisions a utility makes. However, an electric utility makes thousands of small decisions every hour regarding fuel, purchased power, and off-system sales.[129] It is not practical to expect a prudence review to uncover and evaluate every one of those decisions.

In her surrebuttal testimony, Staff's witness Lena Mantle analogized Empire to a driver of a company car. If the company provides the driver with 100 percent reimbursement for any fuel he uses while driving the car, the driver is not likely to pay close attention to how far he drives, how much the gas costs, or whether the car is running efficiently. However, the driver's attention to those details will increase if he is required to pay a portion of the cost of the fuel he uses.[130] At the hearing, Empire asked Mantle whether her hypothetical driver would pay more attention to fuel costs if he had to justify every trip he took, every mile he drove, and how well he maintained his car, or face a requirement to repay a portion of his fuel costs.[131] As Mantle acknowledged, such a prudence review would assure that the driver was not blatantly wasting fuel.

To continue the analogy, such a review would ensure that the driver did not take an unauthorized joy ride to Las Vegas. However, a prudence review could not be detailed enough to discover whether the driver took the optimal route to work. It certainly could never determine whether the driver wasted gas by accelerating fast from stop lights. It is that sort of small, but cumulatively significant, decisions that are addressed by requiring Empire to have a financial stake in its fuel and purchased power decisions.

So some sort of financial incentive is needed to ensure that Empire pays close attention to its fuel and purchased power costs, and to remind Empire that a fuel adjustment clause is a privilege, not a right, which can be taken away if the company does not act prudently. Staff's proposal restricting Empire to a 70 percent pass-through ensures Empire will not be able to recover its reasonable and prudent costs of service if,

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[128] Transcript, Page 682, Lines 7-19.
[129] Transcript, Pages 710-711, Lines 14-25, 1-24.
[130] Mantle Surrebuttal, Ex. 213, Page 3, Lines 10-16.
[131] Transcript, Page 657, Lines 5-16.

as expected, fuel costs rapidly rise. Staff calculated that from 2002 through 2006, Empire absorbed $85.5 million in fuel and purchased costs above the costs it was allowed to recover in rates.[132] Under Staff's 70 percent pass-through incentive proposal, Empire would still be required to absorb 30 percent, or $25.65 million of those costs over the previous four-year period. Under Public Counsel's 60% pass-through proposal, Empire would have absorbed 40 percent, or $34.2 million of those costs over the previous four year period. Such a great percentage of reduction would effectively prohibit Empire from earning its allowed return on equity and discourage investment at a time when Empire needs tens of millions of dollars in new capital investment.

Brubaker's proposal from his direct testimony is flawed in that the dead band, in the expected rising cost situation, would cost Empire $1.2 million from the start. Thereafter, it would cost the company five percent for the next $20 million in increased costs, potentially another $1 million. As a result, Empire will be denied a sufficient opportunity to earn a fair return on equity.

Brubaker's proposal from his surrebuttal testimony allows Empire to recover a greater proportion of its costs than would Staff and Public Counsel's proposals, but its flaw is its unnecessary complexity. Absorption of five percent of any excess fuel costs above the base level by Empire is sufficient incentive to improve the efficiency and cost effectiveness of its fuel and purchased power procurement activities and to allow Empire the opportunity to actually earn the return on equity awarded by this Commission.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Empire's fuel adjustment charge shall include an incentive clause providing that 95 percent of any deviation in fuel and purchased power costs from the base level agreed to by the parties shall be passed to customers and 5 percent shall be retained by Empire. This incentive clause will give Empire a sufficient opportunity to earn a fair return on equity as required by Section 386.266 and the Hope and Bluefield decisions. At the same time, it will protect Empire's customers by giving the company an incentive to be prudent in its decisions by not allowing all costs to simply be passed through to customers.

Other Details About the Fuel Adjustment Clause

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[132] Staff Report – Cost of Service, Ex. 204, Page 61.

Two or more parties disagree about several particular elements of the Fuel Adjustment Clause to be established by Empire. The Commission will separately identify and address each of those elements.

Unit Train and Fuel Handling Costs:

Findings of Fact:

Maurice Brubaker, witness for the Industrial Intervenors, contends unit train costs and fuel handling costs should not be included in the fuel adjustment charge pass-through because such costs are basically fixed or demand-related costs that are not volatile and are controllable by the utility.[133] He also points out that inclusion of demand-related costs in a fuel adjustment clause would disproportionately burden high load factor customers.[134]

Empire's witness, W. Scott Keith, persuasively explained that unit train costs are included as a component of coal costs and flow through the fuel inventory to the income statement as the coal is consumed. If those costs were excluded from the fuel adjustment clause, the differences between the fuel costs for coal recorded on Empire's books would differ from the fuel costs for coal included in the fuel adjustment clause, requiring reconciliation each time a filing is made.[135] Unit train costs represent only about one percent of overall energy costs and are relatively stable compared to gas price fluctuations.[136] Similarly, exclusion of fuel handling costs would contribute to reconciliation problems between Empire's general ledger costs and those costs included in the fuel adjustment clause.[137]

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Unit train costs and fuel handling costs are relatively small costs that are intertwined with larger and more volatile fuel costs. Excluding them from the fuel adjustment clause would increase the burden on those persons at Empire and on Staff who will have to periodically audit Empire's accounts and the fuel adjustment clause. Under the circumstances, unit train costs and fuel handling costs shall be included in the fuel adjustment clause.

Natural Gas Pipeline Demand Charges:

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[133] Brubaker Surrebuttal, Ex. 505, Page 8, Lines 10-17.
[134] Brubaker Surrebuttal, Ex. 505, Page 10, Lines 10-17.
[135] Keith Rebuttal, Ex. 3, Page 7, Lines 7-16.
[136] Keith Rebuttal, Ex. 3, Page 7, Lines 15-16.
[137] Keith Rebuttal, Ex. 3, Page 7, Lines 17-19.

Findings of Fact:

Brubaker for the Industrial Intervenors would exclude natural gas demand charges from the fuel adjustment clause, again because they are fixed-costs that are not volatile.[138] The demand charges associated with fuel costs represent natural gas pipeline demand charges that are part of the transportation and storage tariffs of suppliers. Those charges are regulated by the FERC and can be changed by the pipelines on short notice. Empire has no control over the tariff filings that can be made to increase those charges and those tariff changes and resulting cost increases can be effective as quickly as 31 days after filing. [139]

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Empire has demonstrated that natural gas pipeline demand charges are volatile despite being regulated by FERC. Natural gas pipeline demand charges shall be included in the fuel adjustment clause.

Emission Allowance Costs

Findings of Fact:

Brubaker for the Industrial Intervenors would exclude emission allowance costs from the fuel adjustment clause because they are environmental-related costs and should be recovered through an environmental cost recovery mechanism as allowed by a rule the Commission has recently adopted.[140] Public Counsel also opposes the inclusion of these costs in the fuel adjustment clause because to do so would violate the regulatory plan stipulation and agreement the Commission approved in Case No. EO-2005-0263.[141] That stipulation and agreement requires Empire to record the proceeds of emission allowance transactions in an account that is to be treated as a regulatory liability to be used as an offset to rate base in any future rate case.[142]

Empire contends it is appropriate to include the emission allowance costs in the fuel adjustment clause because there was no alternative mechanism for the recovery of those costs in place at the time it filed its rate case. Furthermore, it contends net emissions costs or allowances are energy related costs that are properly included in a fuel

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[138] Brubaker Surrebuttal, Ex. 505, Page 7, Lines 21-22.

[139] Overcast Rebuttal, Ex. 10, Page 12, Lines 1-10.

[140] Brubaker Surrebuttal, Ex. 505, Page 8, Lines 1-6. The rule to which Brubaker refers is 4 CSR 240-20.091, which became effective on June 30, 2008.

[141] Kind Rebuttal, Ex. 303, Page 10, Lines 8-20.

[142] Kind Rebuttal, Ex. 303, Page 10, Lines 15-20.

adjustment clause.[143]

Conclusions of Law:

Section 386.266.2 RSMo (Supp. 2007) allows an electric utility to apply to the Commission to establish a rate adjustment mechanism "to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any federal, state, or local environmental law, regulation or rule." The statute further states: "any rate adjustment made under such rate schedules shall not exceed an annual amount equal to two and one-half percent of the electrical … corporation's Missouri gross jurisdictional revenues, …".

The Commission has recently promulgated a rule allowing for the establishment of an Environmental Cost Recovery Mechanism (ECRM) to implement the provisions of the statute. That rule, 4 CSR 240-20.091, became effective on June 30, 2008.

Decision:

Emission allowance costs shall be included in the fuel adjustment clause. Such costs are an implied tax on the use of a particular fuel, generally vary with the amount of fuel consumed and are beyond Empire's control.[144] It is reasonable to allow Empire to recover those costs through a fuel adjustment type mechanism. The ECRM mechanism was not available at the time Empire filed its rate case so it is reasonable to allow those costs to be included in the fuel adjustment clause the Commission is approving in this case.

Public Counsel's argument that an alternative treatment of those costs is required by the stipulation and agreement in Case No. EO-2005-0263 is not persuasive. That language requires a specific method of emission revenue accounting until a Commission decision is reached regarding the appropriate accounting for that revenue.[145] The Commission's decision in this case supersedes the temporary accounting method set out in the earlier stipulation and agreement.

Heat Rate Testing of Generation Plants:

Commission Rule 4 CSR 240-3.161(2)(P) requires that a proposed schedule, testing plan, and written procedures for heat rate or efficiency tests of a utility's generating facilities accompany any request for a fuel adjustment clause. Empire worked with Staff to develop a testing plan acceptable to Staff.[146] This issue is resolved so the

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[143] Overcast Rebuttal, Ex. 10, Pages 12-13, Lines 16-23, 1.
[144] Overcast Rebuttal, Ex. 10, Page 12, Lines 17-19.
[145] Keith Surrebuttal, Ex. 4, Pages 10-11, Lines 20-22, 1-6.
[146] Transcript, Pages 725-728.

Commission will not address it further.

Rate Design of the Fuel Adjustment Clause:

Findings of Fact:

This issue concerns the details of the tariff that will actually implement Empire's fuel adjustment clause. Those details are included in tariff sheets attached to the direct testimony of Empire's witness W. Scott Keith as Schedule WSK-3.[147] Staff disagreed with some of the details of that tariff. At the hearing, Empire offered a revised tariff into evidence that Staff agreed accurately reflected Staff's fuel adjustment clause proposal.[148]

The biggest difference between Staff and Empire's proposals, aside from the incentive clause provision that has already been addressed, appears to have been Staff's proposal to adjust Empire's base cost of fuel by season. Empire contends the seasonal cost variance is small and does not warrant the adjustment proposed by Staff.[149] Staff contends the seasonal adjustment will tend to moderate fluctuations that might otherwise occur in the fuel adjustment collections.[150]

In its post-hearing brief, Empire indicates its willingness to accept Staff's version of the fuel adjustment clause tariff entered into evidence as Exhibit 31, except for Staff's proposed 70/30 pass-through proposal.[151]

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Staff's proposal to seasonally adjust Empire's cost of fuel is reasonable as a means of reducing fluctuations and shall be adopted. The parties apparently agree that the exemplar tariff prepared to Staff's specifications is acceptable except for the incentive clause. The Commission has previously described the incentive clause that should be included in the fuel adjustment clause. Therefore, the tariff prepared to reflect Staff's proposals and entered into evidence as Exhibit 31, shall be incorporated into Empire's compliance tariff filing, except as otherwise modified in this Report and Order.

3. Off-System Sales Margin

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[147] Keith Direct, Ex. 2, Schedule WSK-3.
[148] Ex. 31, Transcript, Page 650, Lines 15-20.
[149] Keith Rebuttal, Ex. 3, Page 4, Lines 4-10.
[150] Staff Class Cost-of-Service and Rate Design Report, Ex. 211, Page 8.
[151] Post-Hearing Brief of The Empire District Electric Company, Page 46.

Discussion:

Most of the electric energy Empire produces at the power plants it owns is sold to its native load customers, in other words, the people and businesses located within its service territory. However, if it can produce more energy than it needs to serve its native load, Empire is able to earn extra revenue by selling excess energy to off-system buyers, such as other utilities, municipalities, or cooperatives. Since the power Empire is able to sell is produced by generating plants paid for by ratepayers, profits (revenues less incurred fuel costs) from these off-system sales should be recognized as a reduction to the company's revenue requirement. For purposes of this case, the Commission must determine the amount of off-system sales margin to be included when calculating the amount of revenue Empire should be allowed to recover in rates.

Empire proposes that its off-system sales should be netted against its fuel costs as part of a fuel adjustment clause.[152] In other words, net revenue from off-system sales would be balanced against fuel costs, with rates varying up or down based upon the amount of the margin.[153] The inclusion of off-system sales as a component in a fuel adjustment clause was supported by Staff,[154] and the Industrial Intervenors,[155] and is not opposed by any party.[156]

The inclusion of off-system sales as a component of the fuel adjustment clause decreases the importance of the figure to be included in base rates for calculating off-system sales because actual sales will be flowed to customers through the fuel adjustment clause. However, selection of a reasonable base number is still important. If the estimate of off-system sales margins included in base rates is higher than Empire actually achieves, then future fuel-adjustment-clause related rate increases would likely be greater than would otherwise be the case.

Findings of Fact:

Empire initially proposed to use a five-year average of its off-system sales margin as the basis for establishing the off-system sales margin number to be included in base rates. Off-system sales margin for

[152] Keith Surrebuttal, Ex. 4, Page 5, Lines 1-6.

[153] Transcript, Page 154, Lines 12-18.

[154] Mantle Rebuttal, Ex. 214, Page 4, Lines 5-6.

[155] Brubaker Direct on Fuel Adjustment Clause/Revenue Requirement, Ex. 500, Page 4, Lines 18-20.

[156] Public Counsel opposes the establishment of a fuel adjustment clause, but does not oppose the inclusion of off-system sales in such a clause if one is established. *See*, Kind Rebuttal, Ex. 303, Page 9, Lines 21-24.

the last five years are as follows:[157]

Twelve Months Ended	Gross Profit (Margin)
June 30, 2003	$5,645,701
June 30, 2004	$2,023,298
June 30, 2005	$1,903,970
June 30, 2006	$3,798,127
June 30, 2007	$3,920,823

The five-year average would thus be $3,458,384.[158]

Staff proposed to determine the off-system sales margin number by totaling Empire's off-system sales margin for the first six months of 2007, and multiplying that number by two, arriving at a proposed off-system sales margin base number of $4,415,779.[159] Subsequently, Empire indicated its willingness to accept Staff's figure.[160]

Public Counsel initially proposed to use Empire's off-system sales margin for calendar year 2007 - $5,955,336 - as the basis for projecting the off-system sales margin Empire can be expected to earn in the future.[161] The true-up audit revealed that for the twelve months ending February 29, 2008, Empire earned an off-system sales margin of $6,116,915. Public Counsel now recommends the Commission use that figure as the base for Empire's anticipated off-system sales margin.[162]

The number proposed by Public Counsel is much higher than the five-year average of off-system sales margin Empire has been able to earn in the past. However, there was an important change in the available off-system sales market in 2007. In February 2007, Southwest Power Pool established an Energy Imbalance Services (EIS) market in which Empire has been able to participate. Participation in the EIS market has allowed Empire to increase its off-system sales over previous years. Empire acknowledged that fact in its 2007 Annual Report (SEC Form 10-K).[163] Furthermore, Empire will likely continue to participate in the Southwest Power Pool EIS market in future years.[164]

Empire's increased off-system sales margins in 2007 can also be

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[157] Keith Surrebuttal, Ex. 4, Page 9, Line 2.
[158] Kind Rebuttal, Ex. 303, Page 5, Lines 1-5.
[159] Staff Report, Cost of Service, Ex. 204, Page 32.
[160] Transcript, Page 154, Lines 1-10.
[161] Kind Rebuttal, Ex. 303, Page 3, Lines 5-7.
[162] Kind True-Up Rebuttal Testimony, Ex. 317, Page 2, Lines 14-16.
[163] Kind Rebuttal, Ex. 303, Page 3, Lines 5-22.
[164] Transcript, Page 157, Lines 17-19.

attributed in part to the existence of a large bilateral sale of capacity and energy to the Kansas City Board of Public Utilities. That contract contributed approximately $1.8 million to Empire's off-system sales revenue.[165] Empire's contract with the Board of Public Utilities will expire in September 2008,[166] but Empire will likely continue to have capacity available to sell, there is a good market for that capacity in the Southwest Power Pool region, and the price at which such capacity can be sold in future years has been increasing.[167]

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Based on the agreement of the parties, the Commission finds it appropriate to include off-systems sales as a component of Empire's fuel adjustment clause. The level of off-system sales revenue margin Empire has been able to earn has fluctuated a great deal over the past five years. Ordinarily that would be a good argument for using a five-year average to set a base for expected off-system sales revenue margin. However, in this case, the Commission is persuaded that Empire's prospects for future off-system sales fundamentally changed when Southwest Power Pool began to offer an EIS market in February 2007. As a result, the off-system sales margin Empire was able to earn in the twelve months following the institution of that market is the best indicator of the margins it will likely be able to earn in the coming years. Consequently, the Commission will order Empire to use $6,116,915 as the base for its anticipated off-system sales margin, for inclusion in the company's fuel adjustment clause.

4. Depreciation

Discussion:

Depreciation is the means by which a utility is able to recover the cost of its investment in its rate base by recognizing the reduction in value of that property over the estimated useful life of the property. Empire's current depreciation rates were established by the Commission in Empire's last rate case, Case Number ER-2006-0315.[168]

Empire proposes to modify certain of its current depreciation rates and offered a depreciation study prepared by Donald Roff, President of Depreciation Specialty Resources, to justify those changes.

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[165] Kind Rebuttal, Ex. 303, Page 3, Lines 22-24.
[166] Keith Surrebuttal, Ex. 4, Page 8, Lines 13-14.
[167] Transcript, Page 198, Lines 8-17.
[168] Schad Rebuttal, Ex. 217, Page 11, Lines 11-14.

Roff indicates there are two primary elements that account for the increase in annual depreciation expense indicated by his study. The first element is longer lives, which has the effect of decreasing annual depreciation expense. The second is the effect of negative net salvage, which tends to increase annual depreciation expense.[169] The changes proposed by Roff would increase Empire's annual depreciation expense by about $1.38 million.[170]

Staff argues it would be inappropriate and unnecessary to allow Empire to modify its depreciation rates while the company is operating under the experimental regulatory plan approved in Case Number EO-2005-0263. Both Staff and Public Counsel contend the study offered by Roff is flawed by the use of bad data provided by Empire. Staff and Public Counsel further contend Roff used inappropriate methodologies in preparing his depreciation study. Both urge the Commission to leave current depreciation rates in place.

Findings of Fact:

In Case Number EO-2005-0263, the Commission approved a stipulation and agreement that implemented an experimental regulatory plan designed to ease Empire's participation in construction of the Iatan 2 generation plant. The approved stipulation and agreement includes a provision allowing Empire to recover an additional regulatory plan amortization (RPA) in this and other general rate cases, to support the company's cash flows to ensure its financial ratios continue to support an investment grade rating on its debt.[171]

If Empire is shown to have a deficiency in its cash flow under current customer rates, then the Stipulation and Agreement from Case No. EO-2005-0263 provides for recovery in rates of a regulatory plan amortization sufficient to restore Empire's cash flows to levels supportive of an investment grade credit rating. Under these circumstances, if the Commission were to grant Empire an increase in its depreciation rates, then such an increase would directly increase Empire's cash flow and reduce the amount of regulatory plan amortization Empire would otherwise require to maintain its current investment grade credit ratings.[172] In other words, every additional dollar Empire received

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[169] Roff Direct, Ex. 25, Pages 2-3, Lines 26-28, 1-2.
[170] Roff Direct, Ex. 25, Page 2, Lines 21-23.
[171] *In the Matter of The Empire District Electric Company's Application for Approval of an Experimental Regulatory Plan Related to Generation Plant*, Case No. EO-2005-0263, August 2, 2005, Order Approving Stipulation and Agreement, Attachment 1, Paragraph 2.
[172] Oligschlaeger Surrebuttal, Ex. 202, Page 17, Lines 3-22.

through increased depreciation rates would decrease its regulatory plan amortization amount by a dollar.

In its last rate case, Empire received a regulatory plan amortization of $10,168,615.[173] As explained in the true-up direct testimony of Mark Oligschlaeger, the amount of that amortization may be reduced somewhat in this case, but the amortization will not go away entirely. Consequently, the Commission's decision on depreciation will have no impact on the rates Empire will be allowed to charge its customers because of this case. Furthermore, since depreciation expense and regulatory plan amortization amounts are booked to the depreciation reserve, the Commission's decision on depreciation rates in this case will have no impact on the company's future rate base amounts either.

Since the Commission's decision on the depreciation issues raised by Empire's depreciation study will not affect the rates that result from this order, there is little need to implement the changes suggested by that study at this time. Furthermore, Staff and Public Counsel have raised significant doubts about the validity of Empire's depreciation study.

The historical salvage/cost of removal data supplied by Empire to Staff did not have any entries coded as reimbursements, and more specifically, did not have any indication the company had received insurance proceeds, third-party reimbursements or any other type of reimbursement.[174] That omission means Staff was unable to make a determination of what amounts of reimbursement were received by Empire and could not evaluate the appropriateness of including reimbursements in the depreciation rate calculations.[175] Furthermore, discrepancies in retirement dollar information between the historical salvage/cost of removal data kept by Empire compared to the historical mortality data maintained by Empire raised questions regarding whether the company's maintenance of mortality records of property and property retirements complies with the requirements of Commission Rule 4 CSR 240-20.030.[176]

At the hearing, Empire's witness, Donald Roff, conceded that the data provided by Empire to Staff apparently did not include data about reimbursements, but alleged the data Empire supplied to him did include

[173] Oligschlaeger True-Up Direct, Ex. 233, Page 11, Lines 21-22.
[174] Schad Rebuttal, Ex. 217, Page 6, Lines 14-19.
[175] Schad Rebuttal, Ex. 217, Pages 6-7, Lines 22-23, 1-2.
[176] Schad Rebuttal, Ex. 217, Page 8, Lines 1-5.

the reimbursement information.[177] He did not explain why he would have received different data than that supplied to Staff. Furthermore, Roff was unable to explain why historical cost of removal salvage and historical mortality data supplied by Empire did not match.[178]

As Roff conceded at the hearing, any depreciation study is only as good as the data that goes into it.[179] The data supplied by Empire and used by Roff to prepare his depreciation study was deficient. In fact, Staff found it so deficient it was unable to draw any conclusions from the depreciation study it attempted to complete for this case.[180]

Public Counsel also challenged aspects of Empire's depreciation study and agrees with Staff that the Commission should leave the company's current depreciation rates in place for purposes of this case. Public Counsel contends Empire's depreciation study inconsistently treated reserve deficiencies and reserve surpluses. Public Counsel asks the Commission to make a finding that for all accounts the reserve deficiency or reserve surplus in each account should be recovered over the remaining life of that account. That proposed change from the Whole Life technique to use of a Remaining Life technique would be a change in established Commission depreciation policy.[181]

Conclusions of Law:

Commission Rule 240-20.030 requires Empire to keeps its accounts in conformity with the Uniform System of Accounts.

Decision:

Given the unreliability of the data supplied by Empire and used in the preparation of its depreciation study, the Commission will decline to make any changes to Empire's existing depreciation rates in this case. Furthermore, because of the application of the regulatory plan amortization, this decision will have no impact on the rates that will result from this case. Since the Commission is rejecting the depreciation study offered by Empire and depreciation rates will remain unchanged, the Commission will not revise its existing policy to substitute the Remaining Life technique for the Whole Life technique advocated by Public Counsel.

5. Inclusion of Asbury SCR in Rate Base

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[177] Transcript, Page 303, Lines 13-23.
[178] Transcript, Pages 305-307, Lines 20-25, 1-25, 1-2.
[179] Transcript, Page 302, Lines 3-9.
[180] Schad Rebuttal, Ex. 217, Pages 10-11, Lines 3-22, 1-2. *See also*, Transcript, Page 343, Lines 7-25.
[181] Schad Rebuttal, Ex. 217, Pages 11-12, Lines 18-23, 1-16.

Findings of Fact:

In 2007, Empire undertook a project to install Selective Catalytic Reduction (SCR) equipment at its Asbury coal-fired power plant. Installation of the SCR equipment at the Asbury plant was needed to allow Empire to meet the requirements of the Clean Air Interstate Rule implemented by the federal Environmental Protection Agency in 2005.[182] Empire planned to install the SCR equipment as part of a scheduled major outage of the Asbury plant and expected the installation to be completed during the fourth quarter of 2007.[183]

The planned installation of SCR equipment at the Asbury plant was addressed in Empire's experimental regulatory plan, which the Commission approved in Case No. EO-2005-0263. That plan established specific in-service criteria that would have to be met before the cost of the equipment would be included in Empire's rate base.[184] As a part of those in-service criteria, the equipment had to be able to demonstrate its efficiency while the generating unit was operated over a continuous 120-hour period.[185]

Empire completed the SCR construction in November 2007 during the scheduled outage of the Asbury plant. Unfortunately, during the outage, Empire determined that the generator for Asbury Unit 1 unexpectedly needed to be rewound, a circumstance unrelated to the installation of the SCR equipment. The rewind pushed the Asbury outage completion date back to February 10, 2008. Since the Asbury Unit could not be run until the outage was complete, performance testing and other in-service criteria for the SCR installation could not be completed until February 29, 2008.[186] The SCR installation met all in-service criteria by that date, and it is currently in use in the provision of electric service to Empire's customers.[187]

Staff initially refused to include the cost of the SCR installation in Empire's rate case because it was not in service as of December 31, 2007, the end of the test-year update period for inclusion of known and measurable costs.[188] However, Staff indicated that if the Commission were inclined to include the SCR installation project in Empire's rate

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[182] Mertens Direct, Exhibit 5, Page 6, Lines 4-18.
[183] Mertens Direct, Exhibit 5, Page 6, Lines 18-20.
[184] Mertins Direct, Exhibit 5, Page 7, Lines 3-11.
[185] Mertins Direct, Exhibit 5, Page 8, Lines 1-3.
[186] Mertins Rebuttal, Ex. 6, Pages 3-4, Lines 21-23, 1-5.
[187] Transcript, Page 102, Lines 11-20.
[188] Oligschlaeger Direct, Ex. 200, Pages 13-14, Lines 21-23, 1-2.

base, it should do so as part of a general true-up rather than as an isolated adjustment. Staff indicated a true-up would ensure all of Empire's revenue, expense, rate base, and rate of return revenue requirement components would be matched and measured consistently with the Asbury SCR addition.[189]

On May 13, 2008, the Commission ordered the true-up suggested by Staff and scheduled a true-up hearing for June 19 and 20. Following completion of its true-up audit, Staff included the Asbury SCR addition in its calculation of Empire's revenue requirement and no longer opposes the inclusion of this plant addition in rates.[190] No other party opposes the inclusion of the Asbury SCR addition in rates.

Conclusions of Law:

There are no additional conclusions of law for this issue.

Decision:

Given the agreement of the parties, the Commission finds that Empire's Asbury SCR addition shall be included in Empire's revenue requirement in the manner set forth by Staff in its true-up audit and testimony.

6. Other Issues Related to the Inclusion of Asbury SCR in Rate Base

Findings of Fact:

Several other issues related to the Asbury SCR addition are also resolved by the inclusion of that project in Empire's revenue requirement. Specifically, in its true-up audit Staff agreed that $1,152,712 in Missouri jurisdictional operating and maintenance expenses associated with the Asbury SCR equipment should be included in Empire's cost of service.[191] Staff also agreed to include an annualized level of depreciation associated with this plant addition in Empire's cost of service.[192] No party has opposed either adjustment.

Empire originally proposed to include 2008 property taxes associated with the Asbury SCR equipment for 2008 as an expense in its cost of service. Subsequently, Empire agreed those taxes would be capitalized as part of the SCR equipment addition and should not be

[189] Oligschlaeger Rebuttal, Ex. 201, Page 6, Lines 16-21.
[190] Oligschlaeger True-Up Direct, Ex. 233, Page 3, Lines 18-21.
[191] Oligschlaeger True-Up Direct, Ex. 233, Pages 3-4, Lines 23, 1-2. See Also True-Up Direct Accounting Schedule, Ex. 234, Accounting Schedule 10, Adjustment S-28.6.
[192] Oligschlaeger True-Up Direct, Ex. 233, Page 3, Lines 21-22.

recovered as an expense.[193] Consequently, the Commission no longer needs to resolve the 2008 SCR property tax issue.

Conclusions of Law:

There are no additional conclusions of law for these issues.

Decision:

Given the agreement of the parties, the adjustments set forth by Staff in its true-up audit and testimony shall be made.

7. Tracker for Cost of Compliance with Commission Rules on Vegetation Management and Infrastructure Inspections

Discussion:

In 2008, the Commission promulgated new rules designed to compel Missouri's electric utilities to do a better job of maintaining their electric distribution facilities to enhance the reliability of electric service to customers. Those rules, entitled Electrical Corporation Infrastructure Standards[194] and Electrical Corporation Vegetation Management Standards and Reporting Requirements,[195] became effective on June 30, 2008.

To deal with the cost of complying with the new rules, Empire proposes an annual expenditure target be set at $9.9 million on a total company basis, which equals $8.9 million on a Missouri jurisdictional basis. That would include $6.1 million for on-going tree trimming, plus $2.8 million for compliance with the new rules. If Missouri jurisdictional expenditures did not reach $8.9 million, then in the following year Empire would be required to spend $8.9 million, plus the shortfall from the previous year, including interest at the company's short-term interest rate.[196] In addition, Empire asks that if it spends more than the $8.9 million target, it be allowed to record those costs as a regulatory asset until it can be considered for recovery, without interest, in its next rate case, which is scheduled to be filed in late 2009.[197]

Staff also suggests the Commission implement a tracker mechanism to allow Empire to recover the cost of complying with these rules. Under Staff's proposal, Empire would be required to spend a total of $8.575 million in Missouri for tree-trimming and infrastructure

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[193] Transcript, Page 78, Lines 7-21.
[194] Commission Rule 4 CSR 240-23.020.
[195] Commission Rule 4 CSR 240-23.030.
[196] Keith Surrebuttal, Ex. 4, Page 13, Lines 9-18.
[197] Keith Surrebuttal, Ex. 4, Pages 13-14, Lines 22, 1-6.

inspection activities.[198] Again, if Empire did not spend the required amount in the first year it would be required to spend the shortfall in the next year, plus interest. Staff would not allow for deferral of any amounts Empire spent in excess of the target.[199]

The difference in the amount of Staff's target proposal from that proposed by Empire is attributed to a difference in the number of years Staff and Empire propose to average in determining the company's cost of complying with the new rules. Empire estimated its cost of compliance for the first year as $2.4 million. For the second year, it estimated its cost of compliance as $2.75 million, with a still higher cost of compliance in the third year. Staff would allow Empire to recover the average cost of compliance for the first two years on the theory that the rates resulting from this case will likely remain in effect for only two years. Empire included the higher cost of compliance in the third year in its average, resulting in a higher average.[200]

Public Counsel opposes the use of a tracker mechanism to allow Empire to recover its future costs of complying with the Commission's new rules. Public Counsel contends those costs fall outside the test-year period and are not yet known and measurable. Therefore they should not be included in rates. Public Counsel also objects to the proposed tracker's requirement that Empire spend a preset amount of money each year, contending that requirement could encourage Empire to waste ratepayer money just to meet the spending requirement.

Findings of Fact:

The Commission implemented its new rules establishing infrastructure and vegetation management standards to address concerns about the reliability of electric service, particularly after summer thunderstorms and winter ice storms. The rules establish specific standards requiring electric utilities, including Empire, to inspect and replace old and damaged infrastructure, such as poles and transformers. In addition, electric utilities are required to more aggressively trim tree branches and other vegetation that encroaches on transmission lines. In promulgating the stricter standards, the Commission anticipated utilities would have to spend more money to comply.

Empire estimates it will ultimately spend an additional $4-6 million per year to comply with the new rules.[201] Staff testified that the

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[198] Transcript, Page 415, Lines 18-19.
[199] Oligschlaeger Surrebuttal, Ex. 202, Page 23, Lines 5-12.
[200] Transcript, Pages 415-416, Lines 22-25, 1-18.
[201] Keith Rebuttal, Ex. 3, Page 11, Lines 13-18.

company's cost estimates are reasonable.[202] To comply with the new rules, Empire has implemented a more aggressive tree-trimming program involving more clearance and more attempts at tree removal.[203] Most significantly, Empire has been required to move from a ten-year tree-trimming cycle to a six year cycle in rural areas and four years in urban areas.[204]

However, Empire acknowledges some uncertainty about the prices it will face as it renegotiates the contracts to perform the extra required work.[205] Empire began actually experiencing additional costs to comply with the new rules at the end of 2007 when it hired a consultant to examine its tree-trimming and infrastructure replacement practices.[206] It anticipated beginning to incur on-going costs, with additional personnel in place, in June 2008.[207]

It is very important for Empire, as well as Missouri's other electric utilities, to improve the reliability of the service it offers its customers. For Empire to take immediate action to increase the scope of its tree-trimming activities would be in the public interest and it should be provided the financial resources needed to accomplish that goal in this rate case.[208] The rates implemented in this case are expected to remain in effect until June 2010, approximately 21 months.[209]

Conclusions of Law:

Commission Rule 4 CSR 240-23.020 establishes standards requiring electrical corporations, including Empire, to inspect its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.020(3)(A) establishes a four-year cycle for inspection of urban infrastructure and a six-year cycle for inspection of rural infrastructure.

Commission Rule 4 CSR 240-23.020(4) establishes a procedure by which an electric utility may recover expenses it incurs because of the rule. Specifically, that section states as follows:

> In the event an electrical corporation incurs expenses as a result of this rule in excess of the costs included in current rates, the corporation may submit a

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202 Oligschlaeger Rebuttal, Ex. 201, Page 9, Lines 12-15.
203 Transcript, Page 371, Lines 12-14.
204 Transcript, Page 385, Lines 11-13.
205 Transcript, Page 375, Lines 16-25.
206 Transcript, Page 377, Lines 14-25.
207 Transcript, Page 380, Lines 18-23.
208 Oligschlaeger Surrebuttal, Ex. 202, Pages 23-24, Lines 22, 1-2.
209 Keith Direct, Ex. 2, Page 15, Lines 1-3.

> request to the commission for accounting authorization to defer recognition and possible recovery of these excess expenses until the effective date of rates resulting from its next general rate case, filed after the effective date of this rule, using a tracking mechanism to record the difference between the actually incurred expenses as a result of this rule and the amount included in the corporation's rates … .

This provision means Empire could ask the Commission for authority to accumulate and recover its cost of compliance in its next rate case, which it intends to file in 2009.

Commission Rule 4 CSR 240-23.030 establishes standards requiring electrical corporations, including Empire, to trim trees and otherwise manage the growth of vegetation around its transmission and distribution facilities as necessary to provide safe and adequate service to its customers. Specifically, 4 CSR 240-23.030(9) establishes a four-year cycle for vegetation management of urban infrastructure and a six-year cycle for vegetation management of rural infrastructure. The vegetation management rule also includes a provision that would allow Empire to ask the Commission for authority to accumulate and recover its cost of compliance in its next rate case.[210]

Decision:

Empire's cost to manage vegetation and inspect infrastructure is a legitimate cost of providing reliable service to its customers. No party disputes that Empire should be allowed to recover those costs in its rates. In the typical rate case, the amount of costs the Commission will allow in rates is determined by examining the costs the company has incurred in the past and projecting those costs into the future. However, in this case, it is certain that Empire's costs in this area will increase due to the additional requirements imposed by the Commission's new infrastructure and vegetation management rules. Hiring additional crews to inspect transmission lines and trim trees more frequently will cost more money. Moreover, Public Counsel participated in the proceeding in which the Commission promulgated its new rules and never challenged Empire's assertion that its costs would increase.[211] No one really disputes Empire's claim that its costs will increase due to the new rules.

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[210] Commission Rule 4 CSR 240-23.030(10).

[211] *Order of Rulemaking*, Mo. Reg. Vol. 33, No. 9, Pages 930-931 (May 1, 2008).

Public Counsel, however, argues that no one can know at this time how much Empire will need to spend to comply with the new rules and thus Empire's increased costs of compliance are not currently known and measurable. Public Counsel contends that instead of including these speculative costs in Empire's rates in this case, the Commission should use the provisions of the rules to allow Empire to defer its increased costs for recovery in its next rate case, when those costs will be known and measurable.

As Public Counsel indicates, no one can know with any certainty how much Empire will spend to comply with the requirements of the Commission's new infrastructure inspection and vegetation management rules. However, rather than compelling rejection of the tracker proposed by Staff and Empire, that fact supports the need for a tracker.

By one means or another, Empire will be able to recover its cost of complying with the rules. If its estimated costs are included in the rates established in this case, Empire will have a stronger incentive to spend the money it needs to spend now to fully comply with the rules. If the company were instead forced to wait until its next rate case to recover the money it spends to comply with the rules, its interest in managing its cash flow would give it an incentive to spend only what it absolutely must to meet the requirements of the rule. As Staff points out, the Commission wants to encourage Empire to take the steps, and spend the money needed, to quickly improve the reliability of its electric service. Furthermore, by including an estimate of Empire's likely cost of compliance in the rates established in this case, the customers who will immediately benefit from the improved reliability will pay the costs required to bring about that improvement, thus improving the match between cost causation and payment for those costs. For both reasons, it is appropriate to allow Empire to recover its anticipated costs of compliance in this case.

However, because those costs are not fully known, it is also appropriate to implement a tracking mechanism to ensure Empire spends the allotted money as intended. The question remains as to how that tracker should be structured.

Staff's proposed tracker simply requires Empire to spend $8.575 million per year in Missouri for tree-trimming and infrastructure inspection activities. If Empire did not spend the required amount in the first year, it would be required to make up the shortfall in the next year, plus interest. Staff's proposed tracker would simply require Empire to track its expenditures to ensure that the money was spent on the desired

activities. If Empire spent more than $8.575 million, it would not be allowed to defer those extra expenditures for possible recovery in a future rate case.

Empire's proposed tracker would require the company to spend $8.9 million in Missouri for tree-trimming and infrastructure inspection activities. Again, if Empire did not spend the required amount in the first year, it would be required to make up the shortfall, plus interest the next year. Empire's proposal differs from Staff's in that Empire proposes it be allowed to track expenditures it makes beyond the $8.9 million it is required to make for possible recovery in its next rate case.

Public Counsel criticized both proposed trackers because they could have the perverse effect of requiring Empire to spend money beyond what it would prudently need to spend to meet the requirements of the rule. Public Counsel's criticism is well founded. If, for example, Empire can fully meet the requirements of the rule while spending only $7 million, it should not be required to spend more ratepayer money simply to meet the requirements of the tracker. The Commission wants to encourage Empire to spend the money it needs to spend to improve the reliability of its service, but there is no need to require the company to waste money.

Public Counsel's concern can be addressed simply by creating a true tracker that creates a regulatory liability in any year where Empire spends less than the target amount, and a regulatory asset where the company spends more than the target amount. The assets and liabilities would then be netted against each other and considered in Empire's next rate case. Empire's current pension and OPEB trackers work this same way.[212]

Staff opposes implementation of a two-way tracker because it wants to require Empire to spend a set amount of money to quickly comply with the requirements of the new rules and thereby improve the reliability of its service. However, it does not want to allow Empire to defer for future recovery any amount it spends above that amount. The actual amount that Empire should prudently spend to meet the requirements of the new rules is simply not certain enough to justify such precision. It is possible that Empire will need to spend more than the target amount to meet the rules requirements and Staff's proposal would give the company a strong disincentive to spend the needed money. It is more reasonable to establish a two-way tracker that will eliminate the

[212] Transcript, Page 403, 10-18.

need for a precise advance determination of the amount of costs Empire should be allowed to recover.

The question remains of where to set the target base amount to be included in rates and around which the tracker will measure variations. Empire's Missouri jurisdictional spending amount of $8.9 million is based on a three-year average of costs that Empire anticipates will rise from year to year. Staff's target of $8.575 million is based on a two-year average of anticipated costs. Since it appears that Empire will file a new rate case within two years, Staff's use of a two-year average is more reasonable.

The Commission will require Empire to implement a two-way tracker for measuring costs relating to infrastructure inspection and vegetation management. The tracker shall create a regulatory liability in any year where Empire spends less than the target amount, and a regulatory asset where the company spends more than the target amount. The assets and liabilities shall then be netted against each other and considered in Empire's next rate case. The annual target amount shall be set at $8.575 million, and Empire shall be allowed to recover that amount in its current rates.

IT IS ORDERED THAT:

1. The Motion to Reject Specified Tariff Sheets and Strike Testimony filed by Praxair, Inc., Explorer Pipeline, Inc., and General Mills, Inc. on April 11, 2008, is denied.

2. The tariff sheets filed by The Empire District Electric Company on October 1, 2007, and assigned tariff number YE-2008-0205, are rejected.

3. The Empire District Electric Company is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order. Empire shall file its compliance tariff no later than August 9, 2008.

4. Any pending motions the Commission has not specifically ruled upon are denied.

5. This report and order shall become effective on August 9, 2008.

Davis, Chm., Murray, and Jarrett, CC., concur;
and Clayton, Gunn, CC., dissent with opinions to follow;
and certify compliance with the provisions
Of Section 536.080, RSMo.

NOTE: At time of publication, no opinion from Commissioner Clayton has been filed. Another order in this case can be found at page 321.

DISSENTING OPINION OF COMMISSIONER KEVIN GUNN

This Commissioner concurs with many of the majority positions contained in the Report and Order. However, the majority's authorization of a 10.8 percent return on equity (ROE), rather than an ROE of 10.5 percent or less, forces this Commissioner to respectfully dissent. While the record supports most of the findings made by the majority in reaching their ROE recommendation, the record does not support the majority finding that Empire remains more risky than the proxy groups used by Vander Weide, Gorman or Barnes following the implementation of the authorized fuel adjustment clause. Accordingly, the majority's upward adjustment to its ROE recommendation to compensate Empire's share holders for the risk associated with the company's BBB- bond rating, as opposed to the BBB+ average bond rating of each proxy group was inappropriate. The more credible evidence supports a ROE of no higher than 10.5 percent and demonstrates that a 10.8 percent ROE is simply too high.

The evidence supports, and this Commissioner agrees with, the following majority findings. First, some of the underlying assumptions in both Gorman's single-stage and two-stage DCF models were arbitrary and flawed yielding recommended ROE recommendations that were over 200 basis points apart. Second, although each may be individually flawed, Gorman's single-stage and two-stage DCF models do not need to be discarded, but can reasonably be averaged in that combining the results of the two models mitigates their individual weaknesses thereby producing a reasonable and balanced ROE recommendation. And finally, a ROE of 10.5 percent, taken from averaging Gorman's single-stage and two-stage DCF models is an appropriate ROE for Empire provided Empire's level of business risk is comparable to that of the proxy groups.[1]

[1] Although not relevant to this dissent it is worth noting that other record evidence not cited by the majority further supports a ROE of 10.5 percent for Empire provided its business risk is comparable to that of the proxy groups.

The flaw in the majority opinion is that the majority's 25 basis point upward ROE adjustment to compensate for Empire's lower bond rating is not supported by record evidence. In determining the appropriate ROE for Empire, it is appropriate to consider whether the calculated ROE should be adjusted to take into account a higher or lower level of operational risk Empire faces compared to the companies in the proxy groups. If the calculation does not take into account additional risk faced by Empire that is not faced by the proxy group companies, it is appropriate to adjust the ROE slightly upward. However, if, as in the present case, the ROE calculation already takes any such risk differential into account, then an adjustment is not necessary.

The majority found Empire riskier than the companies contained in the proxy groups because the average bond rating of each proxy groups is BBB+ while Empire's current bond rating is only BBB-. The majority further found the risk difference associated with having a BBB+ verses a BBB- bond rating is worth 25-50 basis points and adjusted their starting ROE of 10.5 up to 10.75 based upon that perceived risk differential.

The majority's addition of 25 basis points to Empire's authorized ROE to account for Empire's higher level of risk compared to the proxy group companies based upon Empire's inferior bond rating would have been reasonable, but for their subsequent reduction to Empire's business risk through the authorization of a fuel adjustment clause. Empire's BBB-bond rating is based upon the level of risk it faced in the environment in which it operated on the date it received that rating. On the effective date of the majority's Report and Order a significant change occurred in Empire's level of risk. Specifically, the majority, with the support of this Commissioner, authorized Empire to adopt a fuel adjustment clause. In the environment where Empire received its BBB- rating, Empire did not have a fuel adjustment clause. As found by the majority, the implementation of a fuel adjustment clause will reduce the level of operating risk that Empire faces.

For Empire's proposed test year revenue calculation, the cost of fuel and purchased power equals 37.63 percent of the company's revenue

requirement. Over the past 5 years, Empire's fuel costs have increased by seventy percent. Staff estimated that between 2002 and 2006, Empire's shareholders had to absorb approximately $85.5 million of fuel and purchased power costs between rate cases. Due to rising fuel costs, Empire's actual earned ROE in 2006 was about nine percent, and that number dropped to about seven percent in 2007. The fuel adjustment clause authorized in this case will allow Empire to recover ninety-five percent of these costs going forward. Clearly the reduction in Empire's operational risk following the implementation of a fuel adjustment clause will be significant. The majority also notes that most of the companies included in the proxy groups used by the analysts already operate under a fuel adjustment clause, and on that basis analysts Vander Weide and Barnes agreed no adjustment to their recommendations would be necessary to recognize the implementation of a fuel adjustment clause in this case. However, Barnes' position that his recommended ROE did not need to be adjusted downward if Empire received a fuel adjustment clause, was based upon his position that the reduced risk Empire would face with an fuel adjustment clause was comparable to the risk level of the proxy group companies that already had fuel adjustment clauses. He did not support raising Empire's ROE to account for its higher level of risk compared to the proxy group companies as reflected by the difference in bond ratings, reducing that risk difference by authorizing Empire to implement a fuel adjustment clause, and then failing to account for that risk reduction in its ROE calculation.

The majority's circular logic on this point is flawed. Although the majority found the implementation of a fuel adjustment clause will reduce Empire's business risk, they ignore the impact the higher level of risk Empire faced prior to such authorization would have had on Empire's bond rating.

The record supports, and this Commissioner agrees with, the majority finding that a quarterly DCF model more correctly equates the present value of future dividends to the current stock price for the companies, like Empire, that pay quarterly dividends. However, the mere five basis point difference between the results obtained using the two models is too slight

to be of real significance and does not justify making an adjustment in a ROE calculation.

In addition to the points above, this Commissioner also agrees with other findings by the majority. First, that a larger proxy group is preferable, if such a group consists of companies with similar risk. Second, the proxy groups used by Vander Weide, Gorman and Barnes are all, on average, less risky than Empire, at least prior to the majority's decision in this case given that each proxy group had an average bond rating of BBB+ verses Empire's BBB- bond rating.

The evidence further supports the finding that it is appropriate to utilize an average of recently authorized returns on equity for vertically integrated electric utilities, excluding wires-only utilities, in a risk-premium analysis because Empire is a vertically integrated company and, as such, its risks are more in line with other vertically integrated electric utilities. The evidence shows that integrated electric utilities are generally more risky than wires-only electric utilities because, unlike wires-only electric utilities, they must make large investments in electric generation plant, operate generating plants and buy fuel to run those plants. The evidence further shows that increased risk generally translates into an increased allowed ROE and regulatory agencies around the country have recognized that increased risk by allowing integrated electric utilities higher returns on equity.[2]

This Commissioner also believes that the calculations performed by and ultimately the ROE recommendation of Empire witness, Vander Weide were seriously flawed. Specifically, Vander Weide's risk premium analysis was inflated due to his use of unreasonably high DCF return estimates. Further, Vander Weide's capital asset pricing model (CAPM) analysis resulted in an unreasonably high ROE estimate due to his inappropriate use of the 2007 average yield to maturity on 20-year Treasury bonds as his estimate of a risk-free rate. The record also supports the finding that the yield on 30-year Treasury bonds is the best

[2] It is worth noting that the Regulatory Research Associates reported the average return on equity allowed in 2007 to integrated electric utilities, excluding wires-only electric utilities, was 10.51 percent. See: Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 3-11.

measure of the risk-free rate for use in CAPM and risk premium analysis because common stock is generally viewed as a long-term investment where the dividends last indefinitely.

While most of the Report and Order is based upon the record evidence, in making their findings the majority seem more driven to justify a desired ROE than to analyze and accept the evidence presented in this case. This Commissioner believes the evidence supports a ROE of 10.5 percent or less and does not support the 10.8 percent ROE authorized by the majority. Therefore, this, Commissioner must dissent.